TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 309.

THE LOUISVILLE TRUST COMPANY, TRUSTEE, &c., PETITIONER,

vs.

LEONARD COMINGOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 27, 1901.
CERTIORARI AND RETURN FILED JUNE 6, 1901.

(18,138.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 9, 1901.

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1 *Transcript of Record.*

United States Circuit Court of Appeals for the Sixth Circuit.

SINSHEIMER, LEVINSON & COMPANY
vs.
SIMONSON, WHITESON & COMPANY. } In Bankruptcy.

"Petition of Leonard Comingore for review."

Augustus E. Wilson, attorney for Louisville Trust Company, trustee in bankruptcy for Simonson, Whiteson & Company:

You are hereby notified that on January 28, 1901, at 12 o'clock m., I will file in the clerk's office of the United States circuit court of appeals for the sixth circuit, at Cincinnati, Ohio, my petition for review in the above-styled cause, a copy of said petition is hereto attached as part of this notice, and I will then ask to have same docketed, and for necessary orders therein to have said case set down for hearing.

LEONARD COMINGORE,
By M. A., D. A., & J. G. SACHS AND
W. M. SMITH, *Attorneys.*

I accept service of the above notice, January 28", 1901.
AUGUSTUS E. WILLSON,
Of Counsel for the Louisville Trust Company,
Trustee in Bankruptcy of said Bankrupts' Estate.

Filed Jan. 28, 1901.
FRANK O. LOVELAND, *Clerk.*

United States Circuit Court of Appeals, Sixth District.

SINSHEIMER, LEVINSON AND COMPANY, FREEMAN Brothers, and N. Snellenburg & Co.
vs.
SIMONSON, WHITESON & Co. } In Bankruptcy.

Petition of Leonard Comingor for Review.

2 The petitioner, Leonard Comingor, respectfully represents that on the 14th day of February, 1899, Sinsheimer, and others, creditors of Simonson, Whiteson and Company, filed their petition in bankruptcy in the district court of the United States for the district of Kentucky, showing that said debtors made an assignment to this petitioner December 5th, 1898, for the benefit of creditors, asking an adjudication in bankruptcy and praying a subpœna against the alleged bankrupts and this petitioner, to which said alleged bankrupts tendered answer and plea and this petitioner did, March 21st, 1899, move the court to dismiss as to him and without waiving the same, tender an answer, although nothing was

alleged against him save that he was assignee for creditors. Petitioner says that no further notice was taken of him in this proceeding and no action taken on his motion to dismiss or offer to answer. He says that in both subsequent ap*pp*eals and in all proceedings subsequent to said motion to dismiss, he was simply dropped out of the case by common consent. He says he was never treated or considered as a party to this bankruptcy proceeding by the court or the parties, since March, 1899, either in the district court or either of the appeals to this court, as the orders, pleadings and records will show. (See record in this court No. 716, page 20, paragraph 3, which record is hereinafter referred to as part hereof.)

This petitioner says further that on March 28th, 1899, said Simonson, Whiteson and Company were adjudged bankrupts and an appeal was taken to this honorable court, resulting in a reversal, with directions to the district court to allow the tendered answer of Simonson, Whiteson and Company to be filed and directing a trial on issue made. In accordance thereto said district court did on August 12th, 1899, set aside and annul said adjudication, file said answer, and on the 20th day of September, 1899, again adjudge said Simonson, Whiteson and Company bankrupts, who again appealed, Septem'er 22nd, 1899. All of the matters herein so far referred to appear n Records Nos. 716 and 777, in this court, and are referred to as parts hereof.

Petitioner says that on said last appeal the adjudication of the said district court, made the 20th day of September, 1899, was affirmed and the mandate of this court was filed below on the 17th day of May, 1900, and the case referred to Baskin, referee in bankruptcy, who did on the 28th day of May, 1900, enter an order without notice and no appearance of any one, directing this petitioner to file with him an itemized statement of receipts and disbursements as assignee under the deed of assignment of the bankrupts and to appear
3 before him in person to settle his accounts as said assignee. A certified copy of said order was served on this petitioner and is filed herewith as part hereof, marked Exhibit No. 1.

Petitioner says that he was thus required to give and did give to said referee said itemized account, from which it appeared that before any proceedings in bankruptcy he had realized on all the assets of the bankrupts, under direction and order of the State court, where a suit was pending long before any petition in bankruptcy, in which he was settling his accounts; that he realized from said assets the sum of $92,865.77, being over 22 per cent. more than the appraised value as made under oath by the appraisers appointed by the State court; that he had disbursed for expenses in carrying on the business and converting assets into cash the sum of $19,876.73; that he drew as his commissions $3,398.90, and paid his counsel for necessary services $3,200.00, all before any proceedings in bankruptcy. A copy of said statement is filed as part hereof, marked Exhibit No. 2.

Whereupon on the 20th of June, 1900, the referee entered an order appointing the Louisville Trust Company receiver herein and directing the said receiver to apply to the Jefferson circuit court, common pleas division, for an order directing the State court receiver to pay over

to the receiver herein the entire fund in said State court in the action of L. Comingor, assignee, &c., *vs.* Simonson, Whiteson and Co., at the same time directing that the receiver shall not appear in said action and shall not receive less than the whole sum in said court. Said referee's order further required petitioner herein and his counsel in said State court proceedings to appear three days thereafter and show cause why they should not pay over to the receiver the sums held by them as commissions and fees and the balance of $6,766.53, not then paid into the State court by Comingor, assignee, for creditors and still in his hands. A copy of said order is filed as part hereof, marked Exhibit No. 3. On the next day, June 21st, 1900, said trust company, receiver herein, appeared before said State circuit court and asked leave to withdraw the entire fund in court, $46,305.03, all of which was submitted to said circuit court. A copy of said motion is filed as part hereof, marked Exhibit No. 4. Accompanying said motion was a notice served on petitioner by the receiver in bankruptcy that the motion would be made before the State court June 21st, 1900, and a copy of an injunction of the district court in this matter enjoining and restraining this petitioner from making any opposition to said motion, said injunction expressly prohibiting this petitioner by name "from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson and Co., in any State court and especially in action No. 19944, entitled L. Comingor, &c., *vs.* Simonson, Whiteson, &c., pending in the Jefferson circuit court." A certified copy of said injunction and said notice *are* hereby filed herewith as part hereof marked Exhibits Nos. 5 and 6, respectively. All of which the State court took under advisement.

4

At the same time that the receiver in bankruptcy was applying to the State court as shown, and your petitioner was restrained from opposing or appearing in response to said notice, the referee in bankruptcy, *sua sponte*, ruled the petitioner herein to pay to said receiver the money retained by him as commissions as appears in said Exhibit No. 3. Petitioner responded June 23rd, 1900, to this rule, that he retained the money as his commissions as assignee under the deed before any proceedings in bankruptcy, and that he had used them and was unable to pay it to the receiver. A copy is herewith filed as part hereof, marked Exhibit No. 7. Immediately on filing said response, said referee adjudged the same insufficient, made the rule absolute, and ordered the petitioner to pay said sum to the receiver before June 30th, 1900. A copy of said order is filed herewith as part hereof marked Exhibit No. 8. Before said date, however, viz., June 28th, 1900, said referee, without notice or appearance of any one and *sua sponte*, entered another show-cause order and had the same served on petitioner, ruling him to pay by June 30th, 1900, to the receiver in bankruptcy the further sum of $3,000.00, "recited in his report," as having been paid to his counsel and the further sum of $200.00, shown in said report to have been paid to others counsel. A copy of which order is filed as part hereof, marked Exhibit No. 9. To which this petitioner responded June 30th, 1900, that these payments were made before any bankruptcy proceedings, that he has no

means to pay said sums to the receiver, that before the petition in bankruptcy was filed and before he had any knowledge, information or intimation that it would be filed, relying upon it that he would wind up his trust under the assignment, he filed his petition in the said court and his action is there pending and he is still subject to that jurisdiction and required to settle in the State court. A copy of this response is filed as part hereof marked Exhibit No. 10. On the same day that said response was filed, June 30th, 1900, the Jefferson circuit court declined to entertain said bankruptcy receiver's motion hereinabove shown to withdraw funds from the court, because said receiver was not a party to the action, and said court suggested that the motion would be entertained when said receiver filed its petition asserting claim to the fund as provided in section 29, Kentucky Code of Practice. Said ruling of the court is in writing and a copy thereof is filed as part hereof, marked Exhibit No. 11.

In accordance with the suggestion of the State circuit court, the receiver (who had in the meantime been chosen trustee in bankruptcy), did on the 3rd day of July, 1900, file a claimant's petition under said Kentucky Code provision, in the State circuit court, making himself a party to said action, having been directed so to do by the order of the referee in bankruptcy. A copy of said petition and exhibits attached thereto, including the said referee's order are filed as parts hereof, marked Exhibit No. 12. Thereafter, on July 5th, 1900, said trustee in bankruptcy tendered his proposed order for withdrawal of said fund accompanying the same with notice to petitioner's counsel and their response whereupon the court made him a party and entered the motion for leave to withdraw the funds then in said court, and sustained his motion and gave said trustee leave to withdraw, which was done. A copy of said motions or order and the notice to petitioner's counsel and their reply is filed as part hereof, marked Exhibit No. 13.

From all of which it appears that the trustee in bankruptcy became a party to the petitioner's suit for settlement in the State court, made it appear to said court that all its officers, including petitioner and his counsel, were paid and the fund remaining in said court would be distributed among the creditor beneficiaries of said deed of assignment and thus obtained the said fund for distribution in bankruptcy herein. At the same time, whilst this was being done, the petitioner was under injunction from the district court herein as already shown, preventing any action on his part in said State court, and at the same time was being pressed by said show-cause rules of the referee in bankruptcy to surrender his commission and pay back the money expended by him in paying counsel before any bankruptcy proceedings, his response to said rules, among other things, showing that the State court suit was pending and he was within that jurisdiction making his settlement. He, therefore, filed his petition for review by the district court, a copy of which is filed as part hereof, marked Exhibit No. 14. Upon which the referee filed his report in said district court, of which a copy is filed as

part hereof, marked Exhibit No. 15. On the 7th day of July,
6 1900, said petition for review came on for hearing before the district court, was heard, and the district court took time to consider; then, on the 16th day of July, 1900, the court entered an order referring the matter back to the referee with directions to take testimony concerning the character of the services of the petitioner and his counsel under the deed of assignment, and their value to the bankrupt estate, and directing the referee to report findings of fact and any modification he might choose to make of his former report and recommendation, a copy of which is filed as part hereof, marked Exhibit No. 16. Whereupon the referee immediately commenced taking evidence and continued to take from time to time, during which, viz.: on the 10th day of November, 1900, this petitioner filed an additional response before the referee, showing in substance that as appears in these proceedings, neither the referee nor the district court has any jurisdiction of the petitioner or of the subject-matter in controversy, and this whole proceeding is illegal and in conflict with the provisions of the bankruptcy law. A copy of said response is filed as part hereof, marked Exhibit No. 17. Thereafter the referee reported to the district court on December 11, 1900, in which report he declines to modify his former rulings and report and recommends the dismissal of petitioner's appeal to the district court for review. A copy of said report is filed herewith as part hereof, marked Exhibit No. 18. Thereafter, on December 22nd, 1900, and whilst this matter was pending before the district court, the said amended or additional response (Exhibit No. 17) was also filed in said court.

Thereafter, on the 19th day of January, 1901, the district court filed an opinion, of which a copy is filed as part hereof, marked Ex. No. 20, sustaining the referee and dismissing the petition for review and directing proper orders to be entered to that end, which orders were entered on the 26th day of Jan., 1901, and a copy of the same is filed as part hereof, marked Exhibit No. 21, and which is in words and figures as follows:

In the District Court of the United States.

SATURDAY, *January 26th*, 1901.

In the Matter of SINSHEIMER, LEVINSON & CO., &C., *vs.* SIMONSON, WHITESON & CO., D. G. SIMONSON, I. Whiteson, & Leo Stern.	In Bankruptcy.

This cause coming on to be heard on the petition of Leonard Comingor, for review of the order of court entered herein by
7 John B. Baskin, one of the referees of this court, requiring Leonard Comingor to pay over to the Louisville Trust Company, trustee in bankruptcy herein, the sums of $3,398.90 and $3,000.00 and the court being fully advised, delivered a written opinion which was filed herein, and on Jan. 19, 1901, and in pursuance of said written opinion, it is considered, ordered and decreed by

the court that said petition for review filed by said Comingor, June, 1900, is refused and dismissed, to which said Comingor excepts and it is adjudged and ordered by the court that said Comingor pay to said Louisville Trust Company, trustee, the said sums of $3,398.90 and $3,000.00 on or before February 16th, 1901, to all of which said Comingor excepts.

Your petitioner further shows that he is aggrieved by the orders of said district court and injured thereby and that the errors complained of consist:

I.

In said court holding that the referee and said court had jurisdiction and power to proceed against petitioner, Leonard Comingor, in the summary way had, he being a third party, and not one of the bankrupts, in said court refusing and dismissing said petition for review and in not sustaining same.

II.

In said court holding that it had jurisdiction and power upon the proceedings, orders and recommendations of the referee had to adjudge said Leonard Comingor in contempt, and to punish him for contempt, or to order him to pay said money.

III.

In said court holding that the referee had jurisdiction and power to proceed against said Leonard Comingor, in said summary manner had.

IV.

In said court holding that said Leonard Comingor held said money for the bankrupts and could be proceeded against in said summary manner had.

V.

In said court holding that it had the power and jurisdiction herein to grant or issue the injunction against Leonard Comingor.

8 VI.

In said court holding that said referee had the power or jurisdiction to issue said show-cause orders or rules thereon or to proceed against said Leonard Comingor in the manner had upon said orders issued.

VII.

In said court holding that the filing of said responses of Leonard Comingor gave said referee or court jurisdiction or power to proceed thereon in any manner in said matter, or in the manner had.

VIII.

In said referee and said court adjudging said responses and each of them insufficient.

IX.

In said court finding the facts to be and adjudging that said sums of money were the property of the bankrupt's estate and that said Leonard Comingor never claimed title to any of it nor made any claim of right to it, or ownership thereof at any time, and that he had never claimed to have converted it to his own use, or to have claimed it adversely to the bankrupts or the trustee or the receiver in bankruptcy.

X.

In the court's adjudging that said money was not converted by Leonard Comingor to his own use, but held for the benefit of the trustee.

XI.

In the court's adjudging that said Leonard Comingor was properly before the court in said proceedings.

XII.

In the court's failing to dismiss said contempt proceedings against Leonard Comingor and discharging him.

XIII.

In the court's finding as a fact and adjudging that said Leonard Comingor as a party to this proceeding in bankruptcy.

XIV.

In the court adjudging and ordering said Leonard Comingor to pay said sums of money to the receiver (who afterwards
9 became the trustee in bankruptcy) in the summary manner had, after ordering said receiver and trustee to make itself a party to the State court proceeding which was done, and the receiver and trustee became a party to said suit in the State court and withdrew all the money paid into the State court by said Leonard Comingor.

XV.

In the court holding that the proceedings herein against petitioner Comingor are equivalent to a plenary proceeding against him.

XVI.

In the court holding that the acts and proceedings herein by or on behalf of the petitioner, Comingor, amount to or are equivalent to or constitute a consent to the jurisdiction of the referee in bankruptcy or the district court herein, in these proceedings against petitioner.

Wherefore your petitioner prays that the orders, judgments and decrees of the district court be reviewed and revised in the matters of law and that it be adjudged that said district court was without

jurisdiction, and if that cannot be done, then adjudge that the summary proceedings herein were illegal and void or if that cannot be done then adjudge that his responses were sufficient in law and he be discharged. He prays for an order of this honorable court directing the district court to suspend the execution of its judgment of January 26th, 1901, and all further proceedings against your petitioner in this matter until the further order of this court, and he prays further for all other necessary and proper relief herein.

M. A., D. A., & J. G. SACHS,
W. M. SMITH,
Attorneys for Petitioner.

Petitioner, L. Comingor, on oath states that the statements of the foregoing petition are true as he believes.

LEONARD COMINGOR.

STATE OF KENTUCKY, }
County of Jefferson, } *ss:*

Subscribed and sworn to before me by L. Comingor, this 28th day of January, 1901. My commission expires January 6, 1904.

D. A. SACHS,
Notary Public in and for Jefferson County, Kentucky.

10 Petition of Leonard Comingor for review in matter of bankruptcy of Sinsheimer, Levison & Company *vs.* Simonson, Whiteson & Company. Filed Jan. 28, 1901. Frank O. Loveland, clerk. M. A., D. A., & J. G. Sachs and W. M. Smith, attorneys for petitioner.

EXHIBIT No. 1.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of SINSHEIMER, LEVENSON & CO., &c., }
vs. }
SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts. }

At Louisville, in said district, on the 28th day of May, A. D. 1900, before John B. Baskin, referee in bankruptcy.

No notice having been given, and no adverse interest appearing, it is hereby ordered that L. Comingor file with John B. Baskin, one of the referees of this court in bankruptcy, at his office, rooms 1001–5, Columbia building, Louisville, Kentucky, on or before June 16th, 1900, at 9.30 o'clock a. m., a detailed and itemized statement showing all the receipts and disbursements made by him of money and other assets belonging to the estates of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, together with all vouchers that he may have for any disbursements.

It is further ordered that said L. Comingor be and appear before the referee aforesaid in person on June 16th, 1900, at 9.30 o'clock

a. m., for the purpose of making settlement of his accounts as assignee of the parties aforesaid.

Witness the Honorable Walter Evans, judge of said court, and the seal thereof, at Louisville, in said district, on the 28th day of May, A. D. 1900.

[SEAL.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

943. Ex. No. 1. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

11 EXHIBIT No. 2.

Receipts and disbursements of L. Comingor, assignee of Simonson, Whiteson and Co., of Louisville, Ky., December 6th, 1898, to Sept. 28, 1899.

Receipts.

653 collections of notes & accounts	$4,702 95	
Cash sales of merchandise, including 757 C. O. D. collections and sale of fixtures	83,231 63	
Rebates on insurance collected	268 90	
Rebate on elevator collected	17 50	
Collection a/c Legion	13 65	
Collection a/c lease of store	4,000 00	
	$92,234 63	
Cash on hand Dec'r 6th, 1898	631 14	
Total receipts		$92,865 77

Disbursements.

For insurance	459 80	
For advertising	2,314 20	
For expenses	4,196 68	
For wages	8,448 22	
For merchandise	4,457 83	
Paid Zack Phelps, att'y	200 00	
Paid D. Sachs, att'y	3,000 00	
Paid L. Comingor, assignee	3,300 00	
Paid Darwin Johnson, "receiver"	59,623 61	
Total disbursements		86,099 24
Balance in hands of L. Comingor, assignee		$6,766 53

BEN. C. WEAVER,
Expert Accountant, Louisville, Ky.

LOUISVILLE, KY., *June 14th*, 1900.

Affiant, L. Comingor, states that on Decem. 5, 1898, he was appointed and qualified as assignee of Simonson, Whiteson and Company, a firm doing business on S. S. Market street, between 4th and 5th, Louisville, Ky.

12 That since said date he has been and is now acting as such assignee.

I employed Ben. C. Weaver as expert accountant to take charge of the books and report condition of same, and to act with me until completion of my trust.

The following-named gentlemen were appointed appraisers of the merchandise, fixtures, &c., of said Simonson, Whiteson & Co., viz: Mr. Tom J. Landrum, Mr. W. T. C. Cross, and Mr. Charles Berle.

I attach hereto their signed appraisement, which they completed about December 10th, 1898, and which shows in part as follows:

Men's and boys' clothing, men's and ladies' shoes, men's and ladies' furnishing, and toys appraised at.....	$56,040 13
Fixtures, electric plant, horse & wagon appraised at.....	7,500 00
	$63,540 13

Open acc'ts & notes appraised at —.

Mr. Ben. C. Weaver took charge of the books of the company on the 6th day of December, 1898, and first counted the cash, which he found and reported as amounting to $631.14.

As soon as the appraisement was completed, Mr. Weaver having the books in charge made the following statement of the affairs of the company to a committee of creditors from New York. This committee consisted of the following-named persons:

This statement of the affairs of the company shown this committee was as follows:

Assets.

Merchandise as appraised.....	$56,040 13	
Fixtures, &c., as appraised.....	7,500 00	
Open acc'ts appraised as good.....	7,485 70	
Cash on hand.....	631 14	
Total assets.....		$71,656 87

Liabilities.

Bills payable.....	$38,305 83	
Acc'ts payable, "Eastern".....	66,249 15	
Acc'ts payable, "City".....	3,676 33	
13 Rents due & to become due.....	13,743 13	
Total liabilities.....		121,974 51
Liabilities exceed.....		$50,317 64

I at once commenced to collect all claims due to said company and as shown by Mr. Ben. C. Weaver's statement I have collected 653 open accounts amounting to $4,702.95, out of the appraised — listed as $7,485.70. This is equal to about 63 per cent. These collections I made and had made without any charges as to attorneys' fees.

The stock of merchandise, as soon as appraised, I commenced immediately to sell and continued to sell until — at which time, by order of the court, I advertised according to law, and had the remnant of the stock and the fixtures then on hand sold at auction.

Mr. Weaver's report hereto attached shows that I sold the stock of goods and fixtures, which were appraised at $63,540.13, for $83,231.63, nearly $20,000.00 more than their appraised value, during the time I purchased only $4,457.83 of mdse.

Add this purchase of mdse., $4,457.83, to the appraised value of goods in the store, it shows that I sold $67,997.96 of goods for $83,231.63; a gain of over $15,000.00 (15,233.67).

I have collected about 63 per cent. of the appraised value of the open accounts and sold the merchandise and fixtures at over twenty-two (22) per cent. over its appraised value.

The statement made by Mr. Ben. C. Weaver, hereto attached, shows in detail every step or transaction taken by me as assignee in connection with my administration of this trust, as to disposing of the stock and fixtures. It shows every item of assets collected and date of same; also every item of expense, &c., paid out by me and date of same. (I have vouchers for all expenditures where voucher could be obtained.)

L. COMMINGOR.

My counsel calls my attention to the claim of the Xenia Shoe Company. They have a specific attachment suit pending in the State court. I bonded the attachment, sold the goods, and the proceeds are embraced herein. I named them as creditors of this estate in the list. If it is determined that they are not creditors, then the proceeds of said goods are not assets herein.

The facts stated in this, my report, herein are true to the best of my knowledge.

L. COMMINGOR.

14 Subscribed and sworn to before me by L. Commingor, this 27 day of June, 1900.

My commission expires January 12, 1904.

CLAUDE W. JOHNSON,
N. P., J. C., Ky.

A copy.
Attest: THOS. SPEED, *Clerk.*

943. Ex. 2. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

Exhibit No. 3.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of Sinsheimer, Levenson & Co., &c.,
vs.
Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson, and Leo Stern, Bankrupts.

At Louisville, in said district, on the 20th day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

This cause coming on to be heard, it is now ordered, adjudged and decreed that the Louisville Trust Company be, and it is, hereby appointed receiver in this cause, with power and authority, and it is hereby directed to apply to the Jefferson circuit court, common pleas division, for an order directing the receiver of said Jefferson circuit court to pay over to it, the Louisville Trust Company, receiver, the entire fund in court in the action of L. Comingor, assignee, &c., against Simonson, Whiteson & Co.; but it, the said Louisville Trust Company, receiver, shall not be authorized to appear in said action in the Jefferson circuit court as a party thereto, nor shall it consent to receive nor shall it receive any less sum than the whole fund in said Jefferson circuit court in said action.

Said receiver is further authorized and directed to take charge of and hold until further orders of court all the assets of whatsoever kind and estates of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, and also to receive from D. Sachs
15 the sum of $3,000 and from L. Comingor $3,398.90, and also from said Comingor the further sum of $6,766.53, and also from Zack Phelps the sum of $200.

It is further ordered that said D. Sachs, L. Comingor and Zack Phelps be and appear before John B. Baskin, one of the referees of said court in bankruptcy, at his office in the Columbia building, Louisville, Ky., on June 23rd, 1900, at 9.30 o'clock a. m., to show cause, if any they can, why they shall not be required to pay over to said receiver the sums aforesaid.

It is further ordered that the Louisville Trust Company, receiver, be, and it is, hereby directed to execute a bond in the penal sum of twenty-five thousand dollars for the faithful performance of its duties as receiver, said bond to be approved by John B. Baskin, referee in bankruptcy of the United States district court for the district of Kentucky.

JOHN B BASKIN,
Referee in Bankruptcy.

943. Ex. No. 3. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT 4.

Jefferson Circuit Court, Common Pleas Division.

LEONARD COMINGOR, Assignee of Simonson, Whiteson & Co., Plaintiff,
vs.
D. G. SIMONSON, &c., Defendants. } Motion.

Now comes the Louisville Trust Company, receiver in bankruptcy, under an order of the Honorable John B. Baskin, referee in bankruptcy, in the matter of the petition in involuntary bankruptcy in the district court of the United States for the district of Kentucky, in bankruptcy, of Sinsheimer, Levenson & Company and others, petitioners, against Simonson, Whiteson & Co., D. G. Simonson, L. Whiteson and Lee Stern, bankrupts, by Augustus E. Willson, attorney, and presented to the court a notice to the plaintiff, L. Comingor, assignee of Simonson, Whiteson & Co., and M. A.
16 Sachs, attorney, accepted by the said Sachs, and also a certified copy of the adjudication in bankruptcy and proceedings thereon, a copy of the injunction issued by the district court of the United States for the district of Kentucky in said proceedings, including the mandate of the circuit court of appeals and the order of the said district court referring the case to the said referee in bankruptcy, and a copy of the order of said John B. Baskin, referee in bankruptcy, of June 20, 1900, and thereupon, said Louisville Trust Company, receiver in said proceedings, in obedience to said order, applied to said Jefferson circuit court, common pleas division, for an order directing the receiver of said Jefferson circuit court to pay over to said Louisville Trust Company, receiver, the entire fund in court in said action, to wit, the sum of $46,305.03, and thereupon (said motion having been considered by the court and the court being sufficiently advised, it is ordered and adjudged by the court that Darwin W. Johnson, receiver of this court, pay the entire

EXHIBIT 11.

balance of the fund in court, said sum of $46,305.03, to the Louisville Trust Company, receiver, in compliance with said order.)

AUGUSTUS E. WILLSON,
Per THE LOUISVILLE TRUST COMPANY,
Receiver in said Bankruptcy.

1900, June 30.

Endorsement by the judge:

The court declines to entertain this motion to withdraw funds from the court because the Louisville Trust Company, receiver, is not a party to this action and has no standing in court. In the present condition of the record it has no right to make any motion herein. When it has filed its petition in this action asserting its

claim to the fund in question as provided by section 29 of the code, the court will be authorized to entertain such motions and make such orders in its behalf as may be necessary and proper*ly*.

A copy.

Attest:

JOHN H. PAGE, *Clerk*,
By KATIE NOLAND, *D. C.*

No. 19944. Common pleas division. L. Comingor, ass'ee,
17 pl'ff, *vs.* Motion of Louisville Trust Co., receiver; Simonson, Whiteson & Co. 1900, June 21st, entered. 1900, June 21, filed in court. Attest: John H. Page, clerk, by R. E. Hancock, D. C.

943. Exs. 4 and 11. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 5.

LOUISVILLE, KY., *June* 20, 1900.

L. Comingor, Esq., assignee of Simonson, Whiteson & Co.; M. A. Sachs, Esq., attorney for L. Comingor, assignee, and for Simonson, Whiteson & Co.

GENTLEMEN: A copy of the order of John B. Baskin, referee in bankruptcy, on June 20, 1900, in the matter of Sinsheimer, Levenson & Co. against Simonson, Whiteson & Co., bankrupt-, has been served upon you and each of you, and you are hereby notified that pursuant to and in obedience to that order, the Louisville Trust Company, receiver, will, on Thursday, June 21, 1900, at or about the hour of 10 o'clock a. m., apply to the Jefferson circuit court, common pleas division, for a- order in the matter of L. Comingor, assignee of Simonson, Whiteson & Co., against Simonson, Whiteson & Co., to pay over to said Louisville Trust Company, receiver in said bankruptcy proceeding, the entire fund in court in the said action of Comingor, assignee, against Simonson, Whiteson & Co.

THE LOUISVILLE TRUST COMPANY,
Receiver in the Matter of Sinsheimer, Levenson & Co. against Simonson, Whiteson & Co. and Others, Bankrupts, in the Suit in Involuntary Bankruptcy in the District Court of the United States for the District of Kentucky, Referred to Hon. John B. Baskin, Referee in Bankruptcy,
By AUGUSTUS E. WILLSON, *Attorney.*

943. Ex. No. 5. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

18 EXHIBIT No. 6.

In the District Court of the United States for the District of Kentucky.

SATURDAY, *April* 1, 1899.

In re SIMONSON, WHITESON & Co.

On motion of petitioners herein it *it* ordered that D. G. Simonson, I. Whiteson and Leo Stern, partners as Simonson, Whiteson & Co., and individually and that Leonard Comingor and their attorneys and all persons to whom notice may come, of these proceedings, be, and they are hereby, enjoined and restrained until the further order of the court, from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson & Co., in any State court and especially in action No. 19944 entitled L. Comingor, &c., *vs.* Simonson, Whiteson, &c., pending in Jefferson circuit court.

A copy.
Attest: THOS. SPEED, *Clerk.*

I, John B. Baskin, one of the referees in bankruptcy of the district court of the United States for the district of Kentucky, do certify that the foregoing is a true and accurate copy of an order as appears from the records on file in my said office and in the office of the clerk of the United States district court for the district of Kentucky.

Witness my hand this 20th day of June, A. D. 1900.

JOHN B. BASKIN,
Referee in Bankruptcy.

943. Ex. No. 6. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 7.

District Court of the United States for the District of Kentucky.
In Bankruptcy.

SINSHEIMER, LEVENSON ET AL.
vs.
SIMONSON, WHITESON ET AL.

Before Hon. John B. Baskin, referee.

19 L. Comingor for response herein to the order to pay $3,398.90, says that, as shown in his report herein, he retained the same on account of his commissions as assignee before any bankruptcy proceedings, relying upon the fact that he would be entitled to more than that sum on final settlement; that for the services rendered the estate herein he believes this hon. court will, on a full hearing, allow him at least said amount; that he is a man of no means, has used of said money from time to time relying upon

its being his until he has none of it left. He says that he is unable to pay said money into court, having neither money or property of any kind. He says that he has recently made efforts to borrow or raise money and finds it impossible to do so. He asks the court for such relief in the premises as the court deems proper.

L. COMINGOR.

Subscribed and sworn to before me by L. Comingor June 23rd, 1900. My commission expires Jan'y 6th, 1904.

MORRIS A. SACHS,
N. P., Jeff. Co., Ky.

No. 943. Comingor's response. Ex. No. 7. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 8.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of SINSHEIMER, LEVENSON & Co., &c.,
vs.
SIMONSON, WHITESON, & Co., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

At Louisville, in said district, on the 23rd day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

No notice having been given, and no adverse interest appearing, comes L. Comingor, by M. A. Sachs and Alex. P. Humphrey, his counsel, and files herein a response to the rule to show cause why he should not be compelled to pay $3,398.90 to the Louisville
20 Trust Company, receiver in bankruptcy in this cause, and after hearing said counsel it is now ordered and adjudged that said response be, and the same is, hereby held insufficient and the rule to show cause why he should not pay said sum as aforesaid is hereby made absolute. It is further ordered that said L. Cominger shall pay to the Louisville Trust Company, receiver in bankruptcy, by 9.30 o'clock a. m., on Saturday, June 30, the said sum of $3,398.90.

JOHN B. BASKIN,
Referee in Bankruptcy.

943. Ex. No. 8. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 9.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of SINSHEIMER, LEVENSON & Co., &c.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

At Louisville, in said district, on the 28th day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

No notice having been given and no adverse interest appearing, it is ordered that L. Comingor be and appear before John B. Baskin, one of the referees in bankruptcy of the above court, at 9.30 o'clock a. m., on June 30th, 1900, to show cause, if any he can, why he shall not be required to pay to the receiver in bankruptcy herein the sum of $3,000 recited in his report as having been paid to M. A., D. A. & J. G. Sachs, and also the further sum of $200 recited in said report as having been paid to Zack Phelps.

JOHN B. BASKIN,
Referee in Bankruptcy.

943. Ex. No. 9. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

21 EXHIBIT No. 10.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & Co. ET AL.
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

L. Comingor for response to the order herein to show cause why he shall not pay the receiver in bankruptcy herein the sum of $3,000 shown in his report as having been paid Mess. M. A., D. A. & J. G. Sachs, and $200 to Zack Phelps, Esq., says that said sums were paid them respectively for services rendered him as his counsel whilst acting as assignee before any proceedings herein, as already appears in his report herein. He says further that he has no money or property or means of any kind with which to pay said money or any part thereof, and refers to his former response herein as part hereof.

He respectfully submits to the court that he ought not to be compelled to pay said money herein.

This respondent says further that long before the petition in this proceeding was filed and before he had any knowledge, information or intimation that it was intended to be filed, and relying upon it that he would be permitted to wind up his trust under the deed of

assignment for the bankrupts shown in the record in this action or proceeding, he filed his petition and brought his action in the State court as appears in this record, which is still pending, and he is still subject to the jurisdiction and orders of said State court requiring him to settle his accounts there and to be responsible there for all his acts and doings under said deed of assignment.

He submits to this hon. court that this response be held sufficient and that the "show-cause" order herein should be annulled or suspended until he is relieved from his present embarrassing position.

L. COMINGOR.

Subscribed and sworn to before me by L. Comingor, June 30th, 1900. My commission expires Jan'y 6th, 1904.

MORRIS A. SACHS,
Notary Public, Jefferson County, Kentucky.

M. A., D. A., & J. G. SACHS,
Counsel for Comingor.

22 943. Response of Comingor to pay the $3,000 paid us. Ex. No. 10. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

I, John B. Baskin, referee in bankruptcy, do certify that the foregoing five pages contain true and accurate copies of two orders and two responses filed before me in the matter of Sinsheimer, Levenson & Co., &c., against Simonson, Whiteson & Co., &c., bankrupts.

JOHN B. BASKIN,
Referee in Bankruptcy.

943. Exhibits Nos. 7, 8, 9 and 10. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT 12.

Jefferson Circuit Court, Common Pleas Division.

LEONARD COMINGOR, Assignee of Simonson, Whiteson & Co., Plaintiff,
vs.
D. G. SIMONSON, &c., Defendants. } No. 19944.

Petition, Answer, and Claim of the Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson, and Lee Stern.

The petitioner, The Louisville Trust Company, states that it is a corporation, organized and doing business under and by virtue of the laws of the State of Kentucky, with power to make contracts, sue and be sued and to act as trustee and in other fiduciary capacity, and authorized to act as trustee in bankruptcy, and was so authorized at the time of its appointment and qualification as trustee, as hereinafter set forth, and is still so authorized.

Petitioner states that as trustee in bankruptcy, in the proceedings

hereinafter set forth, it is the owner of and entitled to the immediate possession of all of the money in court in this action, to wit, the sum of $46,305.03, and that it claims the right to said money and fund and that neither the plaintiff nor defendants nor anybody
23 else any longer has any title to said fund or any part thereof.

That heretofore, to wit, on the 14th day of February, 1899, certain persons, to wit, Sinsheimer, Levenson & Co., Freeman Bros., and N. Shellenborg & Co., and others, creditors of the defendants, Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, filed in the district court of the United States for the district of Kentucky, at Louisville, their petition in involuntary bankruptcy against D. G. Simonson, I. Whiteson and Leo Stern, composing the firm of Simonson, Whiteson & Co., whereby said petitioners sought to have said defendants adjudged bankrupts under and by virtue of an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," and that said defendants, D. G. Simonson, I. Whiteson and Leo Stern, partners as aforesaid, were duly and regularly served with process of subpœna of said court with a copy of said petition as required by said act of Congress and general orders of the Supreme Court of the United States made thereunder. That thereafter, such proceedings were had therein, that heretofore, to wit, on the 28th day of March, 1899, an order, decree and judgment was entered by said court in said proceeding adjudging that said Simonson, Whiteson & Co., a copartnership composed of D. G. Simonson, I. Whiteson and Leo Stern and the individual members thereof, D. G. Simonson, I. Whiteson and Leo Stern, be and they were adjudged bankrupts within the true intent and meaning of the acts of Congress relating to bankruptcy and the matter of the bankruptcy of said parties, was thereupon, then and there referred to John B. Baskin, one of the referees in bankruptcy of said court, to take such further proceedings thereon as are required by said acts. There were other provisions in said order not material to be here set forth. Copy of said order has been heretofore filed herein with the motion of the Louisville Trust Company as receiver in bankruptcy, and is hereby made part hereof. That thereafter, the said defendants, Simonson, Whiteson & Co., and said members of that firm, appealed from said judgment to the United States circuit court of appeals for the sixth circuit, and that heretofore, to wit, on the 17th day of May, 1900, the mandate of the said circuit court of appeals of the United States for the sixth circuit, was filed in said district court, a certified copy whereof has heretofore been filed herein and is made part hereof, whereby said adjudication in bankruptcy was affirmed with costs, and an order *as* made that such proceedings be had in said cause in con-
24 formity with the opinion and decree of the court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding, and thereupon, and heretofore, to wit, on the 12th day of February, 1900, in accordance with said mandate, it was further ordered, adjudged and decreed by the district court of the United States in bankruptcy for the district of Kentucky, that the decree entered in said proceedings September

20, 1899, should stand in full force and that the petitioners, Sinsheimer, Levenson & Co., Freeman Bros., and N. Snellenberg & Co., recover of said D. G. Simonson, their costs therein expended, and the court further ordered as follows: "It is further ordered that said matter be referred to John B. Baskin, one of the referees in bankruptcy of said court, to take such further proceedings therein as are required by said acts, and that the said D. G. Simonson, I. Whiteson and Leo Stern, shall attend before said referee on the 25th day of May, A. D. 1900, at Louisville, Ky., at 10 o'clock a. m., and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said bankruptcy, all of which particulars of said orders are heretofore filed herein by the Louisville Trust Company, receiver, and now made part hereof, and that in said proceeding and heretofore, to wit, on April 1, 1899, an order was entered by the district court in said proceedings in bankruptcy, by which it was ordered that the said D. G. Simonson, I. Whiteson and Leo Stern, partners as Simonson, Whiteson & Co., and individually, and Leonard Comingor, the plaintiff in this action, and their attorneys and all persons to whom notice might come of said proceedings, are and were enjoined and restrained until the further order of the court from taking any steps instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson & Co., in any State court and especially in action No. 19944, entitled L. Comingor, &c., *vs.* Simonson, Whiteson & Co., &c., pending in the Jefferson circuit court, a copy of which order, heretofore filed herein by the Louisville Trust Company, as receiver, is referred to as part hereof, and that thereafter and in pursuance of said order and heretofore, to wit, on the 20 day of June, 1900, before said John B. Baskin, referee in bankruptcy, who, under and by virtue of said proceedings, had due control thereover and jurisdiction thereof, it was ordered, adjudged and decreed that The Louisville Trust Company, this petitioner, be and was thereby appointed receiver in said cause, with power and authority to apply to the Jefferson circuit court, common pleas division, for an order directing the receiver of said Jefferson circuit court to pay over to it,
25 the Louisville Trust Company, receiver, the entire fund in court in the action of L. Comingor, assignee, &c., against Simonson, Whiteson & Co., and by said order it was further authorized and directed to take charge of and hold until further order of the court, all the assets of whatsoever kind and estates of Simonson, Whiteson & Co., composed of D. G. Simonson, I. Whiteson & Leo Stern. There were other proceedings in said order not material to here set forth, a copy of which has been heretofore filed in this action by said receiver and is hereby made part hereof. That on the said 20th day of June, A. D. 1900, it was ordered by said referee in bankruptcy that a meeting of the creditors of said Simonson, Whiteson & Co., and said D. G. Simonson, I. Whiteson & Leo Stern, be held on the 30th day of June, 1900, at the office of said referee, to elect a trustee in bankruptcy, and that thereafter and heretofore, to wit, on the 30th day of June, 1900, said meeting of said creditors was held and your petitioner, The Louisville Trust Company, -as at

said meeting duly and regularly elected to the office of trustee in bankruptcy in said proceeding of said Simonson, Whiteson & Co., and said D. G. Simonson, I. Whiteson and Leo Stern, and that thereupon your petitioner executed bond in said court and qualified as such trustee as required by law as shown by copy of order filed herewith as part hereof and has been since and is now acting as such trustee, and that heretofore, to wit, on said 30 day of June, 1900, on the motion of certain creditors of said bankrupts, it was ordered by said referee that your petitioner as trustee in bankruptcy of said estate, should present its petition as the owner of and entitled to said fund, and apply to this court for an order directing the payment of said fund to your petitioner, full particulars of which order will be seen from a copy thereof herewith filed as part hereof.

Your petitioner will, if required, set forth at length herein the allegations of the said petition in involuntary bankruptcy; but said petitions set- forth the assignment for the benefit of creditors, which is referred to in the petition of plaintiff in this action, and that by the provisions of the said bankruptcy laws of the United States such an assignment is an act of bankruptcy and gave the said district court jurisdiction to adjudge said Simonson, Whiteson & Co., and said members thereof, bankrupts in said proceeding in involuntary bankruptcy. Your petitioner further shows that it desires an administration of said estate in bankruptcy and in said bankruptcy proceeding; that said property is in the possession of this court, through its receiver.

26 Your petitioner further states that officers of this court, the clerk, sheriff and commissioner, have been paid all of their fees and have no claims upon the fund herein, and that the fund in court herein, to wit, the sum of $46,305.03, belongs to the creditors of said bankrupt firm and that nobody else has any interest therein, neither officers, attorneys nor anybody else, and that under said proceedings, the title to said fund has passed to your petitioner as the trustee in bankruptcy for the benefit of all of the creditors of said bankrupts.

Wherefore, your petitioner prays the court that this, its petition, be filed, and further prays the court to order and direct that the plaintiff make your petitioner a defendant herein, and that your petitioner's pleading and petition be taken as its answer and petition herein to the fund in court, and further prays the court to order and direct the receiver of this court to pay to your petitioner as trustee in bankruptcy in said proceedings in bankruptcy, under and by virtue of the proceedings, appointment, order and qualification, said sum of $46,305.03, and further respectfully apply- to the court for all further and proper relief.

AUGUSTUS E. WILLSON,

Attorney for Petitioner, The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson, and Leo Stern, Bankrupts.

STATE OF KENTUCKY, }
County of Jefferson, } ss:

H. V. Loving, on oath states that he is president of the petitioner, The Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, defendants under the proceedings in the district court of the United States for the district of Kentucky, in the matter of Sinsheimer, Levenson & Co. and others, petitioning creditors, against said Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson, and Leo Stern, bankrupts, and that affiant believes that the statements of the foregoing petition are true.

H. V. LOVING.

Subscribed and sworn to before me by H. V. Loving, this 30th day of June, 1900. The date of the expiration of my commission as a notary public is the fifteenth day of February, 1902.

N. R. BROWN,
Notary Public, Jefferson County, Ky.

27 To the plaintiff, Leonard Comingor, assignee of Simonson, Whiteson & Co., and Sachs Brothers, attorneys for the plaintiff, Leonard Comingor, assignee.

GENTLEMEN: You and each of you are hereby notified that the Louisville Trust Company, receiver, as set forth in the foregoing petition, answer and claim, will, on the 30th day of June, 1900, present to the Jefferson circuit court, in case No. 19944, of Leonard Comingor, assignee of Simonson, Whiteson & Co., plaintiff, against D. G. Simonson, &c., the above petition, a copy of which is hereby delivered to each of you at the time of serving this notice, and will apply to the court to order and direct the receiver of the court upon said petition, to pay to the Louisville Trust Company, trustee in bankruptcy, the sum of $46,305.03 in court in this action, and you are notified to be present and attend if you have any objection to the granting of said order.

AUGUSTUS E. WILLSON,
Att'y for Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., &c.

STATE OF KENTUCKY, }
County of Jefferson, } ss:

George Minor, on oath states that he executed the above notice on M. A., D. A. & J. G. Sachs, attorneys of Leonard Comingor, and on Leonard Comingor, assignee of Simonson, Whiteson & Co., by delivering to Morris A. Sachs, one of the members of Sachs Brothers, attorneys for said Comingor, assignee, at 3 o'clock p. m., and to Leonard Comingor, assignee of Simonson, Whiteson & Co., at 4.15 p. m., a copy of the above notice and the above petition on the 30th day of June, A. D. 1900.

GEO. MINOR.

Subscribed and sworn to before me by George Minor, this 30th day of June, 1900. My commission as a notary public expires February 15, 1902.

N. R. BROWN,
Notary Public, Jefferson County, Ky.

The undersigned hereby admit- that a copy of the foregoing petition and notice was delivered to —— Sachs, a member of the firm of Sachs Brothers, attorneys for said Leonard Comingor, assignee of Simonson, Whiteson & Co., and to him as attorney for the
28 plaintiff, Leonard Comingor, assignee of Simonson, Whiteson & Co., this 30th day of June, 1900.

—— ——,
A Member of the Firm of Sachs Brothers, Representing All of Them, and Attorney for Leonard Comingor, Assignee of Simonson, Whiteson & Co.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & COMPANY
vs.
SIMONSON, WHITESON & COMPANY, D. G. SIMONSON, I. Whiteson, and Leo Stern, Bankrupts. } In Bankruptcy.

At Louisville, in said district, on the 30th day of June, A. D. 1900, before John H. Baskin, referee in bankruptcy.

On motion of the Louisville Trust Company, trustee, herein, it is ordered that said trustee file a petition to be made a party to the suit pending in the Jefferson circuit court, common pleas division, styled Leonard Comingor, etc., against D. G. Simonson, etc., and said trustee is further directed in said petition to pray the honorable Jefferson circuit court to turn over to it, the Louisville Trust Company, trustee, in bankruptcy, the fund in said Jefferson circuit court in the cause aforesaid.

JOHN B. BASKIN,
Referee in Bankruptcy.

Order Approving Trustee's Bond.

Form No. 26.

At a court of bankruptcy held in and for the district of Kentucky, at Louisville, Kentucky, this 30th day of June, 1900.

Before John B. Baskin, referee in bankruptcy, in the district court of the United States for the district of Kentucky.

29 In the Matter of SIMONSON, WHITESON & Co., &c., Bankrupt. In Bankruptcy.

It appearing to the court that the Louisville Trust Company, of Louisville, in said district, has been duly appointed trustee of the

estate of the above-named bankrupt and has given bond with sureties for the faithful performance of its official duties, in the amount fixed by the creditors (or by order of the court), to wit, in the sum of twenty-five thousand dollars, it is ordered that said bond be, and the same is hereby, approved.

JOHN B. BASKIN,
Referee in Bankruptcy.

I, John B. Baskin, one of the referees of the above-styled court in bankruptcy, do certify that the foregoing is a true and accurate copy of an order entered in the above cause on the 30th day of June, 1900, as appears from the records on file in my said office.

Witness my hand this 30th day of June, A. D. 1900.

JOHN B. BASKIN,
Referee in Bankruptcy.

A copy.
Attest:

JOHN H. PAGE, *Clerk*,
By KATIE NOLAND, *D. C.*

Exhibit 12. No. 943. No. 19944. Leonard Comingor, ass'ee, &c., *vs.* D. G. Simonson, &c. Petition, answer and claim of Louisville Trust Company, trustee in bankruptcy. 1900, July 3rd. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 13.

Sachs law building, 546 & 548 West Jefferson St.

M. A., D. A., & J. G. Sachs, attorneys-at-law.

LOUISVILLE, KY., *July 5th*, 1900.

A. E. Willson, Esqr.

DEAR SIR: We return papers as requested. We do not see our way clear to comply with your requests because the injunction prevents us.

As to other matters referred to in your letter will see you.

Yours, etc., M. A., D. A., & J. G. SACHS.

30 EXHIBIT No. 13.

LOUISVILLE, KY., *July 13th*, 1900.

Messrs. M. A. Sachs, D. A. Sachs, and J. G. Sachs, attorneys for Leonard Comingor, assignee of Simonson, Whiteson & Co.; Leonard Comingor, assignee of Simonson, Whiteson & Co.

GENTLEMEN: I have inquired of Judge Field whether there was any objection to filing the petition and making the order in case No. 19944, of Comingor, assignee, *versus* Simonson, Whiteson & Company, of the Louisville Trust Co., as trustee in bankruptcy, to withdraw the fund in court in accordance with its petition.

He ordered the petition filed, provided I struck out of it certain parts on the fifth page, which were put in for the benefit of the court,

and to show that you had no claim on any of the money in court, and those parts have been struck out, as they are not material to the right of the trustee to withdraw the money from the fund in court, and thereupon the petition was ordered filed and has been filed. Then I asked the judge to sign the order making the petitioner a party and giving leave to withdraw the money, and said to him that if there was any just objection to it, I was entirely willing, personally, that it should be made without injury to anybody, and that as you were under injunction, you might, so far as I had the power to grant it, explain why the order ought not to be made without appearing of record in the matter, and that I should not report your action, and I asked him to set a time and he set Thursday morning at 10 o'clock, in the court-room of the common pleas division, and I promised to notify you, and I do hereby notify you.

I request that you sign and return to me to file that morning the short amended petition making the trustee a party, which I enclose to you. I will ask you to sign the memorandum below indicating that this letter and the petition have been presented to you with the notice of the meeting for 10 o'clock Thursday morning. I do not see what we gain by argument. I would be very glad if you would make a memorandum on the enclosed motion and say that, as far as you are concerned, it is agreeable to you.

Yours truly, AUGUSTUS E. WILLSON,
Attorney for said Trustee.

31 A copy of the above letter and amended petition herein has been handed to the undersigned as attorney for L. Comingor, assignee of Simonson, Whiteson & Co., and as representative of M. A., D. A. and J. G. Sachs, attorneys, on the 3rd day of July, A. D. 1900.

____ ____,
Attorney for All of said Parties.

EXHIBIT No. 13.

Jefferson Circuit Court, Common Pleas Division.

LEONARD COMINGOR, Assignee of Simonson, Whiteson & Co., Plaintiff,
vs.
D. G. SIMONSON, ETC., Defendants.
} No. 19994. Motion and Order.

This day came the Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, by Augustus Willson, its attorney, and presented to the court its petition presented to the court June 30, 1900, and heretofore filed herein claiming the fund in court herein, together with the exhibits referred to therein and the notice therewith served on the plaintiff, Leonard Comingor, assignee of Simonson, Whiteson & Co., and on M. A. Sachs, of the firm of M. A., D. A. and J. G. Sachs, attorneys for said plaintiff, and also presented a copy of said letter

to said Comingor, assignee, and his said attorneys, showing that the motion would be presented at this time and hour, July 5th, at 10 o'clock a. m., and answer of M. A., D. A. & J. G. Sachs, attorneys thereto, and thereupon said petitioner, by Augustus E. Willson, attorney, moved the court that the said petitioner, The Louisville Trust Company, trustee in bankruptcy of said bankrupts, Simonson, Whiteson and Co., D. G. Simonson, I. Whiteson and Leo Stern, be made a party defendant to this action, and thereupon said trustee moved the court that said petition be taken as the answer and petition of the said Louisville Trust Company, as such trustee, claiming the fund in court herein, which is so ordered by the court, and
32 thereupon the said Louisville Trust Company, trustee in bankruptcy of said Simonson, Whiteson and Company, D. G. Simonson, I. Whiteson and Leo Stern, moved the court for leave to withdraw from the fund in court herein the sum of $46,305.03, and thereupon, the court being sufficiently advised, it is ordered by the court that the said petitioner, The Louisville Trust Company, trustee in bankruptcy of said Simonson, Whiteson and Co., D. G. Simonson, I. Whiteson and Leo Stern, be, and is, allowed to withdraw this day from the fund in court the sum of $46,305.03.

EMMET FIELD,
Judge of the Jefferson Circuit Court,
Common Pleas Division.

A copy.
Attest: JOHN H. PAGE, *Clerk*,
By KATIE NOLAND, *D. C.*

943. Ex. 13. No. 19944. Common pleas division. L. Comingor, ass'ee, &c., *vs.* D. G. Simonson. Motion of Louisville Trust Co., trustee in bankruptcy, &c. 1900, July 5th. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 14.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & Co., &c.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, & Leo Stern, Bankrupts. } In Bankruptcy.

Respectfully represents the petitioner, L. Comingor, that during the course of the proceedings herein, before John B. Baskin, one of the referees in bankruptcy of this court, a rule was issued against the petitioner to show cause why he should not be compelled to pay to the receiver the sum of $3,398.90; also another rule was issued against the petitioner to show cause why he should not pay the further sum of $3,000 by him paid to M. A., D. A. & J. G.
33 Sachs, for services as counsel for him in his capacity as assignee under the general assignment under the State law; that your petitioner filed responses to both of said rules which re-

sponses having come on to be heard were adjudged by the said referee insufficient and said rules were made absolute. Your petitioner shows that said referee erred to his prejudice in issuing both of said rules, also in adjudging both of said responses insufficient, also in making both of said rules absolute.

Wherefore, your petitioner prays that the orders of said referee above set forth may be reviewed by the honorable judge of this court.

L. COMINGOR,
By his counsel, M. A., D. A., & J. G. SACHS.

Petition for review filed with referee by M. A., D. A. & J. G. Sachs, att'ys, June 30, 1900, 9.30 a. m.

JOHN B. BASKIN,
Referee in Bankruptcy.

A copy.
Attest: THOS. SPEED, *Clerk.*

943. Ex. 14. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 15.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & Co., &c., vs. SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, and Leo Stern, Bankrupts. } In Bankruptcy.

At Louisville, in said district, on the 30th day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

Report of Referee.

This case goes to the judge upon a petition for review of the action of the referee in issuing rules against L. Comingor to pay
34 $3,398.90 retained by him for his services as assignee under the State law, and also to pay $3,000 by him paid to M. A., D. A. & J. G. Sachs for counsel fees.

Under the bankruptcy law, if L. Comingor had been elected trustee and administered the whole estate he would not be allowed more than the sum of $675. He has retained for his services $3,398.90. The record shows that no order of allowance has ever been made to him by the State court, nor by this court sitting in bankruptcy. It appears from the report made by said Comingor, in my office, that he took from the funds in his hands the following sums upon the dates set opposite thereto, to wit:

December 24, 1898...	$150 00
December 22nd, 1898...	500 00
December 21st, 1898...	150 00
December 19th, 1898...	150 00
February 13th, 1899...	100 00
February 13th, 1899...	2,348 90

It will be observed that on February 13th, 1899, he received the sum of $100.00 and the sum of $2,348.90, being the day before the petition in bankruptcy was filed.

I ruled that said Comingor was entitled to no compensation whatever, and that his retaining all the above sums as compensation was unwarranted.

In the case of L. Marx & Bro., in bankruptcy in this court (Judge Evans presiding), ruled orally that where the same party acts as assignee under the State law and trustee in bankruptcy, the commissions prescribed by the bankruptcy law might be allowed, but he expressly stated in his oral opinion that no duplication of such fees would be permitted, that is to say, that the court would not allow one fee to a trustee in bankruptcy and another fee to an assignee under the State law.

It was held by Judge Ballard *in re* Cohn, Federal cases No. 2966, or 6th National Bankruptcy Register, 379, that an assignee is not entitled to compensation for himself nor for his counsel.

The case of *In re* Freeman K. Kingman, reported on pages 518 and 519 of the First National Bankruptcy News, and also the case of *In re* Solomon & Co., reported on page 460 of the Second National Bankruptcy News (both under the present law), will throw some light upon the question involved, especially upon the point that duplication of fees would not be permitted.

Under the authority of the three cases aforesaid, I also
35 ruled that said Comingor had no legal right to pay fees to his counsel, especially when no allowance had been made by the State court therefor, and in contemplation of law said assignee must be deemed to have the funds in his possession.

These proceedings are now certified to the judge to deal with said Comingor for disobeying said rules to pay the two sums aforesaid.

All of which is respectfully submitted.

JOHN B. BASKIN,
Referee in Bankruptcy.

Referee's report. No. 943. Ex. 15. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 16.

United States District Court, District of Kentucky.

MONDAY, *July* 16, 1900.

In the Matter of SINSHEIMER, LEVENSON & Co.
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

Pending the action of the court upon the report and recommendation of the referee upon the rule issued by him against L. Comingor, requiring him to pay to the trustee of the bankrupts two certain sums of money described therein, the case is referred back to the referee with instructions to him to make such testimony as may be offered, and such as may be pertinent upon the following inquiries, namely, what services, if any, were rendered by the respondent Comingor, as assignee of the firm of Simonson, Whiteson & Co., before the petition in this case was filed by the creditors, and the value thereof to the estate and creditors of the said firm; second, what services were rendered by the said respondent as such assignee after filing the petition herein, and the value thereof to the estate and creditors of the bankrupts; third, what services, if any, were rendered to the respondent as such assignee by his attorneys,
36 M. A., D. A, and J. G. Sachs, the necessity therefor, and the value thereof to the estate of said bankrupts; fourth, he will report his findings upon each of these inquiries, and also any modification he may choose to make of his former report and recommendation herein.

A copy.
Attest: THOS. SPEED, *Clerk*.

No. 943. Ex. No. 16. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 17.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVINSON & Co.
vs.
SIMONSON, WHITESON & Co.
In Bankruptcy.

Leonard Comingor amends his response herein to the orders to pay $3,398.90 and $3,000.00, and for amendment says that as shown by the pleadings, record and evidence in this case taken, and the entire proceedings had herein, neither this court nor the referee in bankruptcy herein has any jurisdiction, either of this respondent or

the matter involved, to make any such orders or require respondent to answer thereto, because he says the records herein show that all transactions with reference to said two (2) sums of money took place before the petition in bankruptcy was filed herein, and that neither this court nor the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay or by summary process.

He says the summary proceedings provided for in the present bankrupt act (sec. 29, subsec. *b*), relates to the bankrupt alone where he conceals from the trustee while a bankrupt or after his discharge, any property belonging to the estate in bankrutcy. This does not include third parties, but relates to the bankrupt alone, under subsec. 4 of sec. 29 of said bankruptcy act, it is made an offense for any person to receive any material amount of property from a bankrupt after the petition in bankruptcy was filed. Under the present
37 act, except in cases coming under one of the two (2) above-named subsections, neither the court nor the referee has the authority (jurisdiction) to compel the payment of money in the summary way provided for under section 41; that is, by order.

Where third parties fraudulently withhold assets of the bankrupt, obtained before the filing of the petition in bankruptcy, the trustee is remanded to his right of action under sec. 23 of the act. Under that section (23) neither this court nor the referee has jurisdiction to proceed as herein attempted by order to pay or by rule or contempt process to enforce said order. He asks that said rule be discharged and said orders to pay be set aside and for his costs.

LEONARD COMINGOR.

Subscribed and sworn to before me by Leonard Comingor, this 10th day of November, 1900.

My commission expires Jan. 6, 1904.

D. A. SACHS,
N. P. in and for J. C., Ky.

A copy.
Attest: THOS. SPEED, *Clerk.*

943. Ex. 17. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 18.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & Co., etc.,
vs.
SIMONSON, WHITESON & Co., D. G. Simonson, I. Whiteson, and Leo Stern, Bankrupts.
} In Bankruptcy. No. 108.

Report of Referee.

On reference of July 16th, 1900.

Filed in clerk's office December 11th, 1900.
THOS. SPEED, *Clerk.*

38 In the District Court of the United States for the district of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & Co., etc.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, and Leo Stern, Bankrupts.
} In Bankruptcy.

Report of Referee.

On the 16th day of July, 1900, the following special order of reference was made in this case:

"Pending the action of the court upon the report and recommendation of the referee upon the rule issued by him against L. Comingor, requiring him to pay to the trustee of the bankrupts two certain sums of money described therein, the case is referred back to the referee with instructions to him to take such testimony as may be offered, and such as may be pertinent upon the following inquiries, namely, first, what services, if any, were rendered by the respondent, Comingor, as assignee of the firm of Simonson, Whiteson & Co., before the petition in this case was filed by the creditors and the value thereof to the estate and creditors of the said firm; second, what services were rendered by the said respondent as such assignee after filing the petition herein, and the value thereof to the estate and creditors of the bankrupts; third, what services, if any, were rendered to the respondent as such assignee by his attorneys, M. A., D. A. & J. G. Sachs, the necessity therefor, and the value thereof to the estate of said bankrupts; fourth, he will report his findings upon each of these inquiries, and also any modification he may choose to make of his former report and recommendation herein."

In obedience to said order, I caused the counsel for the trustee and L. Comingor and M. A., D. A. and J. G. Sachs, to appear before me and the depositions of the following parties were taken:

C. M. S. Hebel, L. Comingor, M. A. Sachs, W. F. Turner, Ben. C. Weaver, W. W. Watts, S. J. Spalding, George Beuchel, Albert Schranz, W. W. Webb, Gus F. Rothenberger, L. W. Botts, D. A. Sachs, Joseph Dinkelspiel, Louis Dinkelspiel, John A. Stratton, Alex. Myers, Mark Sales, Theodore Harris, J. Lewis Williams, F. B. Stouffer, R. W. Croxton, J. M. Andrew, R. B. Gelatt, S. S. Meddis, N. Bierman, S. M. Goldsmith, Randal Whittier, and E. B. Kerr.

39

The deposition of I. Whiteson had been previously taken, but by stipulation of parties same was read by me on the hearing.

By further stipulation the printed records of the circuit court of appeals in this cause, being numbers 716 and 777, were also considered on the hearing under said reference.

I will make separate reports on each specific direction in the order of reference.

I.

I am directed to find:

"What service, if any, were rendered by the respondent, Comingor, as assignee of the firm of Simonson, Whiteson & Co., before the petition in this case was filed by the creditors and the value thereof to the estate and the creditors of said firm."

On December 5th, 1898, the bankrupts made a general assignment to their book-keeper, L. Comingor. Within three days thereafter, to wit, on December 8th, 1898, Comingor filed a suit in equity in the Jefferson circuit court for advice in the administration of his trust and for settlement thereof. By leave of the State court he continued to operate the store of bankrupts, selling the goods at private sale until the 30th day of January, 1899, when on the latter day he made a sale to Henry Stern, at public auction, of the remaining stock of goods and fixtures as a whole, under leave of court, for $15,000. He also sold the leasehold on the store to Henry Stern, on the 20th day of July, 1899. The petition in bankruptcy was filed February 14th, 1899. The making of these sales completed the bulk of his labor as assignee. In making a computation of the actual time engaged by said Comingor, I estimate that he was employed in the aggregate, between the making of the assignment and the filing of the petition in bankruptcy, sixty days, including Sundays and holidays, during which time his duties were onerous and his responsibility considerable. His services were such as are usual in closing out assets of such quantity. It is true, as his counsel contends, that he realized from the assets in cash, gross, the sum of $92,865.77, but he turned over to the trustee in bankruptcy $6,766.53, and the trustee further obtained from the State court the sum of $46,305.03, which the assignee had paid into court in his settlement suit aforesaid, making $53,071.56, which came to the hands of the trustee in bankruptcy.

40

Immediately after the bringing of the suit for settlement and instructions, the assignee obtained leave of court to continue the opera-

tion of the store of bankrupts, and on January 25th, 1899, he procured an order of sale for the remaining stock of goods and fixtures at public auction as a whole. In his petition, for the order of sale he represented that "the stock is so far reduced by the sales aforesaid, as to leave only the fixtures and remnants and odds and ends of a broken stock of merchandise." That representation was untrue, though it was used to obtain from Judge Field an order to sell the property as a whole. The order directed advertisement by only two insertions in the Louisville Times and by hand bills posted for three days on the store and at the court-house door. The duration of the advertisement was inadequate, ten days being the usual advertisement for chancery sales, and the advertisement of only a square and a half in the Times (as more fully explained in the deposition of S. S. Meddis taken in the State court, but adopted as his testimony in this case), was grossly insufficient and most unusual. The goods should have been separated into classes, the hats, shoes, clothing, furnishing goods, etc., etc., etc., being placed in separate lots; and then offered in such lots, so that merchants dealing in each kind of goods could bid therefor. One witness estimates that there was about $6,000 worth of hats, men's clothing, $12,000; boys' clothing, $7,000; furnishing goods, $12,000; ladies' furnishing goods, $10,000; ladies' shoes, $6,000, and men's shoes, $4,000, in the store at the time of the sale on January 30th. This evidence is not disputed by any witness. A hat merchant could not bid at the sale unless he had use for the fixtures and balance of the goods, and so with other merchants dealing in other lines of goods. It is a notable fact that though the order of sale was made on January 25th, insertions in the Times were made on the two latest possible days, Friday the 27th, and Saturday, the 28th of January (the 29th being Sunday, upon which day the Times is not issued), and the sale being Monday morning, before the paper came out. The assignee procured no further advertisement in the newspapers; he mailed no notices of the anticipated sale to creditors; and while the sale was being made he allowed the goods to remain in boxes or covered up with dust-cloths, and to remain on the different floors of the building while the sale was being conducted on
41 the first floor. Besides, he did not cause the auctioneer to exhibit an inventory of what the goods consisted, but simply caused or permitted him to state that the sale would include all the goods and fixtures in the entire building as a whole. J. Lewis Williams, a disinterested witness, testifies, and I find it to be true, that when the sale was made the store appeared to be closed, there was but a small advertisement on the door, which alone was open, no auction bell was rung and no auction flag exhibited. In addition to this the evidence shows that Abe Levy, of Levy Bros., two men by the name of Hays, one by the name of Sellinger, Louis Dinkelspiel, Joseph Dinkelspiel, and others were induced by the bankrupts, including Whiteson, not to bid at the sale.

Moreover, the evidence shows that before the sale Henry Stern, a brother of the bankrupt, Leo Stern, came from New York, and an arrangement was then made by which said Henry Stern should

buy the entire stock and fixtures for $15,000, and after paying four creditors of the firm fifty per cent. of their demands, the profits that might be realized should be divided between the bankrupts. To this arrangement I find that the bankrupts and Henry Stern were parties, and further I find that the assignee and one of his counsel were cognizant of it before the sale was made. Before this illegal contract was made and shortly before the sale, an inventory of the stock on hand was taken, and it was then ascertained by the bankrupts and Henry Stern that said stock and fixtures were worth about $67,000.

On the 14th of June, following the sale the members of the firm signed a memorandum prepared by Mr. Morris A. Sachs, reciting that they had agreed to divide equally between themselves all that may be left out of the assets of Simonson, Whiteson & Co., and what they may save from the wreck after paying the indebtedness of said firm to D. L. Newborg & Son and Stern, Falk & Co. The bankrupt, Whiteson, testifies that the arrangement was to pay only fifty per cent. of the claims of those two creditors and also fifty per cent. to two other creditors.

After the stock and fixtures were thus bought by Henry Stern for $15,000 he continued the business, adding, according to the undisputed evidence of Whiteson, between fifteen and twenty thousand dollars worth of new goods, for all of which I find, as a matter of fact, that there was realized at least the sum of $82,000, as that much was deposited in the German bank to the credit of Henry Stern by his brother, Leo Stern, who represented him in Louisville,
42 while he himself resided in New York. Allowing $20,000 as the sum realized from these new goods and allowing $15,000 more for expenses paid by check for conducting the store for five months, and there will be left $47,000 as realized from the goods which were sold for $15,000. During the time that the store was thus conducted by Henry Stern's brother, the members of the old firm were retained as clerks, receiving each $62.50 per week. Whiteson testifies, too, that notwithstanding the large salaries drawn by the bankrupts during this period, he and Simonson were paid $2,500 as the profits realized after satisfying the four creditors included in the fraudulent arrangement aforesaid. Henry Stern, Leo Stern, Simonson, and the four creditors thus preferred are not introduced to deny this evidence of Whiteson's; and in the case of D. L. Newborg & Co., Whiteson is corroborated by the fact that Leo Stern purchased drafts aggregating $9,443.00 which were sent to Henry Stern in New York and by him paid over to D. L. Newborg & Son, and their endorsements appear thereon. The books of this new business conducted by Henry Stern will either sustain or contradict the testimony of Whiteson, yet it appears from a letter of Leo Stern (Exhibit "3" with the deposition of Whiteson) that those books were burned.

In the face of the fact that these preferred creditors are not brought to contradict Whiteson, I assume and therefore find that his testimony is true in that regard. The making of the memorandum in Mr. Sachs' office reciting the agreement, though subsequent

in time, is a corroboration of Whiteson's statement that the agreement was made. The assignee and his counsel strongly deny all knowledge of the guilty arrangement above recited and flatly contradict Whiteson, who testifies to their positive participation in that arrangement. Several witnesses testify that Whiteson is not worthy of belief on oath, and in his answer filed in the State court he swears to facts diametrically opposed to his testimony in this case, but nevertheless he is corroborated in so many essential particulars, and though the witnesses who could contradict his testimony are presumably obtainable, they were not introduced before me and therefore I am constrained to find that his testimony as to the making and carrying out of that fraudulent agreement is true.

Whiteson shows, and Henry Stern and the other bankrupts are not brought to contradict him, and he produced a memorandum, partly written in the handwriting of Henry Stern, that a week or ten days before the assignment the stock was valued at $170,000, and this valuation he says was verified by Henry Stern. He
43 further produced a memorandum book of his own, showing the estimate placed upon the stock by appraisements the day before the sale of January 30th. This aggregates $67,000, including the fixtures. In this, too, he is uncontradicted.

The defense to the inadequacy of the advertisement is made that it was ordered by the State court. That is true; but the assignee and his counsel controlled the case in court, and such cases are practically *ex parte*, and Judge Field made that order of sale upon such brief and insufficient advertisement by the procurement of the assignee or his counsel and upon the sworn petition of the assignee, in which he misrepresents the character of the goods as well as the quality, and this, too, without notice to any of the parties so far as the records show. In such cases the court almost invariably relies upon the counsel for the propriety of the order and almost invariably permits counsel to prescribe the extent of the advertisement.

The terms of that order of sale did not, however, preclude the assignee from adopting the methods usual in making sales of such a large quantity of goods. The order did not direct him to scatter the goods over four floors of a large building and to conduct the sale on one floor. It did not direct the assignee to keep a large part of the goods concealed in boxes or covered by dust-cloths, nor to withhold from the auctioneer and the prospective bidders all knowledge of what they might be buying and the quantity and quality of the same; and it did not direct the assignee not to exhibit an auction flag or ring an auction bell; it did not direct him to postpone the insertion of the advertisement in the paper until the latest possible days.

These acts and omissions of duty could evidence but one thing, and that was the design to suffer a fraudulent sale to be made. I therefore find and report, (1) that the haste in bringing the settlement suit in the State court; (2) the manner of procuring the order of sale without notice; (3) the terms of the order of sale; (4) the brief and limited advertisement; (5) the compression of the size of the advertisement into a square and a half in the newspaper; (6)

the instructions of Comingor to insert it in the usual way for court sales without display and the late insertion thereof; (7) the previous request of Simonson to Stouffer at the newspaper office not to display the advertisement; (8) the request of Simonson to Gelatt not to mention in the Louisville Commercial that a sale would take place; (9) the undisputed threats of Heyman that he would move to have the order of sale vacated and his action in not doing
44 so because satisfied by a personal promise of Aaron Kohn that his clients would receive fifty per cent. of their demands; (10) the failure of Mr. Sachs to call Levy and Caldwell to deny the statement made by Whiteson that Levy was by his advice bought off from bidding at the sale; (11) the failure to take the testimony of the other persons who are shown by Whiteson to have been induced not to bid at the sale; (12) the failure to introduce Leo Stern, Henry Stern and D. G. Simonson to contradict Whiteson; (13) the actual execution in Mr. Sachs' office, in June, of a memorandum of the previous fraudulent agreement; (14) the drafts obtained from the German bank and sent to D. L. Newborg & Son, one of the creditors mentioned in said fraudulent agreement, through Henry Stern, thus evidencing that they were paid in pursuance of that fraudulent agreement; (15) the selling of the stock scattered throughout the entire building without exhibiting to the bidders, and without an inventory and without even announcing of what it consisted or ringing a bell or exhibiting an auction flag; (16) closing the front of the store except the door (the assignee and Mr. D. A. Sachs being present at the sale); (17) the misstatement in the petition for sale that the goods consisted of the remnants and odds and ends of a broken stock in order to secure from Judge Field an order for the sale of the same as a whole; these circumstances, among many others, have forced me to make the finding. I, therefore, find upon the first point of the reference that the services of the assignee as a whole were of no value to the estate and creditors of the firm of Simonson, Whiteson & Co., but were a positive pecuniary injury.

II.

"As to the services rendered by the assignee after the filing of the petition in bankruptcy," I report that these services were merely nominal and were therefore of a small value; the only thing of consequence done by him after the bankruptcy proceedings were begun being the sale of the leasehold on the store of the building. The testimony does not show what would be a fair compensation for making that sale.

III.

"As to what services, if any, were rendered to the assignee by his attorneys, M. A., D. A. & J. G. Sachs, the necessity therefore and the value thereof to the estate of bankrupts," I find that one of said attorneys was actively engaged as counsel for the assignee for
45 about the same length of time that the assignee was himself actually employed, to wit, about sixty days, but beyond that time, to wit, after the filing of the petition in bankruptcy, his serv

ices to the assignee were of an unimportant character. Beyond the fact of drawing the assignment, advising the assignee how to prepare the inventories required by the State law, bringing the suit and obtaining authority to conduct the business at retail and the giving of such frequent advice, as is usual in important trusts of that character, there was no necessity for their services. This finding that there was no such further necessity is based upon my previous finding in this report that the obtaining of the order of sale and the advice following and incidental thereto were improper and therefore unnecessary. For the services thus found to have been necessary, I report that $1,000 would be ample and full compensation. But if the services rendered by the counsel must be considered as a whole, inasmuch as I have found that some of the acts of the assignee and his counsel were not beneficial but on the other hand were injurious to the estate, and not rendered in the real interest of the creditors, I am constrained to report that said counsel should be allowed nothing for their services.

The testimony offered upon this question of compensation was all introduced by them; it was intended to cover their entire services without separating those acts which I find unnecessary and improper from those reported to be necessary.

This evidence does, however, establish the fact that the $3,000 claimed by them for their entire services is usual and reasonable according to the scale of compensation allowed for such services by the State court in Louisville.

But as I am presumed to know something about such compensation myself, and am unable to report that such a large sum as $3,000 is unreasonable, I find from my own knowledge of such matters, without any further evidence upon the subject, that $1,500 would be reasonable and ample for the work of the counsel extending over the whole period of the time they were acting for the assignee but this conclusion is made to depend upon the assumption that their services were rendered in good faith and for the benefit of the estate, the contrary of which I have found.

IV.

The order of reference further directs me to report any modification I may choose to make of my former report and recom-
46 mendations. In view of the decisions in the cases of Gilblom and King, 2nd National Bankruptcy News and Reports (November 1st, 1900, number), page 1046, which are to the effect that the assignee is not entitled to compensation nor to his expenses for counsel fees under circumstances similar to those in this cause, I make no modifications of my former report and recommendations, but, on the contrary, recommend that the appeal of said Comingor and M. A., D. A. and J. G. Sachs, from said former ruling, which is to the effect that said Comingor shall pay to the trustee the sum of $3,398.90 retained by him for his services as assignee and the further sum of $3,000 paid by him to M. A., D. A. & J. G. Sachs, be overruled, and that my said order be confirmed and enforced by this honorable court.

The testimony taken before me is herewith returned with this report in a separate package, marked as follows: "Testimony taken before the referee pursuant to order of reference, entered July 16th, 1900."

All of which is respectfully submitted.

JOHN B. BASKIN,
Referee in Bankruptcy.

A copy.
Attest: THOS. SPEED, *Clerk.*

943. Filed Jan. 28, 1900. Frank O. Loveland, clerk.

EXHIBIT No. 19.

Not to be reported.

United States District Court, District of Kentucky.

by the common council in the form of an ordinance which

In the Matter of SINSHEIMER, LEVENSON & Co., ETC., *vs.* SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, and Leo Stern, Bankrupts. } Opinion. In Bankruptcy.

The referee, at the instance of the trustee in this case, and after full writ en response, in June, 1900, ruled the assignee, L. Comingor, to pay to the trustee as part of the assets of the bankrupts, certain funds in his hands acquired under the voluntary assignment to
47 him which was the sole basis of the adjudication of bankruptcy in this case. The court was soon afterwards, upon the petition of Comingor, asked to review this ruling of the referee. Pending a decision of that question, and in order to acquire fuller information, the court, on July 16th, 1900, referred the case to the referee for the ascertainment of certain specific facts bearing thereon. The referee has filed a report in response to that order, which, together with the other testimony, to say the least, discloses a remarkable state of facts, but which I shall not notice in detail. Since this last report was made in December, 1900, and still pending the consideration of the original petition for a review, the assignee, Comingor (who, it may be remembered, was actually a party to the original bankruptcy petition), has tendered to the court an amended response in which the claim is made for the first time (although probably in perfect fairness the claim might be considered as relating back to November 10th, 1900, when the amended response was offered to be filed, before the referee, who declined it because he was hearing evidence only under the special order of July 16th, 1900), that the court has not jurisdiction of this proceeding against Comingor, because it is presumed, of the ruling of the Supreme Court of the United States in the case of Bardes *vs.* Hawarden Bank, 178 U. S., 524, and possibly because of the ruling of the circuit court of appeals for this circuit in the recent case of W. T. Nugent. Without entering into an argument upon the subject, it may suffice to

say that it does not seem to me that the case before me is reached, in principle, by the Bardes case, and while I have not seen the opinion of the court in the Nugent case, it is well known to me that the facts are very different from the facts in this case. But whether the case would come within that of Bardes *vs.* The Bank, or not, Comingor has in no way claimed any adverse right, as owner, to the fund which he received by the act of bankruptcy on which the adjudication herein was made, and the State court, has long since surrendered to the trustee all of the fund so derived, but Comingor thinks something should be allowed to him for compensation for what he had done in the administration of the trust before the adjudication in bankruptcy, and for certain expenses incurred therein in the way of attorneys' fees. He submitted himself to the jurisdiction of this court in these proceedings upon these questions, and insisted in his original response filed in June, 1900, that he should, in equity and justice, be allowed to retain an amount sufficient to cover his own compensation and the sums which he claims
48 to have paid to his attorneys. It was concerning these claims thus submitted without objection to the jurisdiction and judgment of this court and after a decision thereon by the referee, that the reference of July 16th, 1900, was made. But for the peculiar character of the services alike of Comingor and his counsel, the trust fund would have been larger by an amount very much greater than the sums they claim, and could, in that event, have well afforded to be taxed with what they ask. In that case the justice of so taxing it would be manifest. I think under these circumstances that the Bardes case does not apply, and without knowing the reasoning of the court in the Nugent case I assume from my knowledge of the facts of that case that it cannot apply here, particularly as Nugent made timely objection to the jurisdiction of the court.

But whether or not, in the abstract, the general principles announced in those cases would otherwise govern the matter now before the court. I think that by the failure of Comingor to interpose any objection to the jurisdiction of the court or to the form of procedure during the long pendency of this proceeding against him, namely, between the time it was begun and November 10th, 1900, or what is probably accurate, December 22nd, 1900, there was a consent upon his part to the jurisdiction of the court and a waiver of all objection to this proceeding based upon that ground.

It seems to me that this conclusion is sound, and that it is demonstrated to be so by the reasoning of Judge Lowell in his opinion *In re* Steuer, 104 Fed. Rep., 976, and by the authorities he cites. Litigants, objecting merely to the forum or to the mere form of a proceeding, must do so seasonably and promptly, or the objection is waived.

During the entire course of the proceeding, and up to November 10th, 1900 (indeed, possibly up to December 22nd, 1900), Comingor submitted himself without objection to the jurisdiction of the court, and was seeking to convince it of the justice of his claim to the compensation and expenses alluded to. The court would be strongly inclined to allow something upon each of these items, were it not

that the facts shown by the evidence perfectly satisfies the court that the services, both of Comingor and of his counsel, instead of benefitting the trust estate, were most injurious thereto, and that instead of intending to benefit the trust, both Comingor and his counsel rather purposed to benefit somebody else. The court is not inclined, under the circumstances, to write with a strong pen
49 about these facts, but the evidence is very clear and satisfactory, that such a state of case exists as to forbid a court, when trying the question upon its merits, to allow to persons, whose relations to the trust fund were such as were those of these parties, any compensation out of that fund for services such as are claimed for in this instance.

Without undertaking to go into detail into the reasons for the conclusion, the court will dismiss the petition for a review of the action of the referee in this regard, and will approve and confirm that action.

Proper orders can accordingly be prepared.

Jan. 19, 1901.

A copy.
Attest: THOS. SPEED, *Clerk.*

108. 943. Sinsheimer, Levenson & Co. *vs.* Simonson, Whiteson & Co. Opinion. Filed Jan. 19, 1901. Thos. Speed, cl'k. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 20.

In the District Court of the United States for the District of Kentucky.

SATURDAY, *January* 26, 1901.

In the Matter of SINSHEIMER, LEVENSON & Co., &c., *vs.* SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, & Leo Stern.	In Bankruptcy.

This cause coming on to be heard on the petition of Leonard Comingor, for review of the order of court entered herein by John B. Baskin, one of the referees of this court, requiring Leonard Comingor to pay over to the Louisville Trust Company, trustee, in bankruptcy, herein, the sums of $3,398.90 and $3,000.00 and the court being fully advised, delivered a written opinion which was filed herein, and on Jan. 19, 1901, and in pursuance of said written opinion, it is considered, ordered and decreed by the court that said petition for review filed by said Comingor, June, 1900, is refused and dismissed, to which said Comingor excepts and it is ad-
50 judged and ordered by the court that said Comingor pay to said Louisville Trust Company, trustee, the said sums of

$3,398.90 and $3,000.00 on or before February 16, 1901, to all of which said Comingor excepts.

A copy.
Attest: THOS. SPEED, *Clerk.*

943. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

51 United States Circuit Court of Appeals, Sixth Circuit, at Cincinnati.

SINSHEIMER, LEVENSON & COMPANY, FREEMAN Brothers, and N. Snellenburg & Co. *vs.* SIMONSON, WHITESON & Co. } In Bankruptcy. Motion.

The Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., bankrupts, by Augustus E. Willson, of counsel, files its notice accepted by counsel for the petitioner, Leonard Comingor, and thereupon move court to dismiss the petition, because the petitioner, Leonard or, has not filed herein a complete record containing in not by reference, all the papers, exhibits, depositions and ceedings which are necessary to the hearing in this court, a t no true copy of the record has been transmitted by the cle f the district court of the United States under his hand and seal as required by the rules of this court.

AUGUSTUS E. WILLSON,
Of Counsel for said Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

943. Motion to dismiss. Filed Feb. 12, 1901. Frank O. Loveland, clerk.

United States Circuit Court of Appeals, Sixth Circuit, at Cincinnati.

SINSHEIMER, LEVENSON & COMPANY, FREEMAN Brothers, and N. Snellenburg & Co. *vs.* SIMONSON, WHITESON & Co. } In Bankruptcy. Notice.

The petitioner, Leonard Comingor, and his counsel, William M. Smith, are hereby notified that on Tuesday, the 12th day of February, 1901, the Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., bankrupts, defendant to his peti-
52 tion herein, will move the court to dismiss this petition and not to hear this case, because a complete record containing in itself all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court, have not been filed, and in the event the court overrules said motion, will move the court not to hear the case until such complete record shall have

been filed, and additional motion to strike out, etc., copy of which is herewith.

AUGUSTUS E. WILLSON,
Of Counsel for Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

—— ——, of counsel for petitioners.

STATE OF KENTUCKY, }
County of Jefferson, } ss:

George Q. Minor, on oath states that he served the within notice on February 11th, 1901, at 11 o'clock and 50 minutes a. m., by delivering a true copy thereof, and of each of the motions therein referred to, to William M. Smith, attorney for petitioner, Leonard Comingor, at his office in Louisville, Ky.

GEO. Q. MINOR.

Subscribed and sworn to before me by George Minor this 11th day of February, 1901.

[SEAL.]

N. R. BROWN,
Notary Public, Jefferson Co., Ky.

943. Notice of motion to dismiss. Filed Feb. 12, 1901. Frank O. Loveland, clerk.

United States Circuit Court of Appeals, Sixth Circuit, at Cincinnati.

SINSHEIMER, LEVENSON & COMPANY, FREEMAN Brothers, and N. Snellenburg & Co.
vs.
SIMONSON, WHITESON & CO. } In Bankruptcy.

Motion of the Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

The Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., bankrupts, by Augustus E. Willson, of
53 counsel, objects to advancing the hearing of the petition for review filed herein January 28, 1901, and the case being set in the present February term and to submitting said petition for review at said term, and to the order suspending the execution of the judgment entered in the district court of the United States for the district of Kentucky on January 26, 1901, requiring the petitioner, Leonard Comingor, to pay said Louisville Trust Company, trustee in bankruptcy, the sum of $3,398.90 and $3,000.00 on or before February 16, 1901, or to suspend proceedings against said Comingor in said district court, and moves to dismiss said petition for review, and objects to the court proceeding farther herein, and moves to dismiss and refuse said petition of Leonard Comingor for review, because said petitioner has not filed, nor does he claim in said petition to file, a transcript of the whole record and proceedings in which he claims there was error in said judgment of said district

court, and because the court has no jurisdiction in the matter, except appellate jurisdiction, and said petitioner has attempted to institute in this court an original action selecting such parts of the record as he deems material, and omitting all of the testimony taken in said proceeding.

Said trustee further moves the court to strike out of said petition the following parts thereof, to wit:

1. The words "Petitioner says that no further notice was taken of him in this proceeding and no action taken on his motion to dismiss or offer to answer."

2. Also the words, "He says that in both subsequent appeals and in all proceedings subsequent to said motion to dismiss, he was simply dropped out of the case by common consent. He says he was never treated or considered as a party to this bankruptcy proceeding by the court or the parties, since March, 1899, either in the district court or either of the appeals to this court, as the orders, pleadings and records will show. (See record in this court No. 716, page 20, paragraph 3, which record is hereinafter referred to as part hereof.)" Because it is not shown by the transcript of the record filed, but is an allegation not based upon the record, but upon his inference from the record.

3. Also the words, "without notice and no appearance of any one" for the same reason given under above No. 2.

4. Also the words, "from which it appeared that before any proceedings in bankruptcy he had realized on all the assets of
54 the bankrupts, under direction and order of the State court where a suit was pending long before any petition in bankruptcy, in which he was settling his accounts; that he realized from said assets the sum of $92,865.77, being over 22 per cent. more than the appraised value as made under oath by the appraisers appointed by the State court; that he had disbursed for expenses in carrying on the business and converting assets into cash the sum of $19,876.73; that he drew as his commissions $3,398.90, and paid his counsel for necessary services $3,200.00, all before any proceedings in bankruptcy."

5. Also the following words: "And directing the said receiver to apply to the Jefferson circuit court, common pleas division, for an order directing the State court receiver to pay over to the receiver herein the entire fund in said State court in the action of L. Comingor, assignee, &c., *vs.* Simonson, Whiteson & Co., at the same time directing that the receiver shall not appear in said action and shall not receive less than the whole sum in said court."

6. Also the following words: "On the next day, June 21, 1900, said trust company, receiver herein, appeared before said State circuit court and asked leave to withdraw the entire fund in court, $46,305.03, all of which was submitted to said circuit court. A copy of said motion is filed as part hereof, marked Exhibit No. 4. Accompanying said motion was a notice served on petitioner by the receiver in bankruptcy that the motion would be made before the State court June 21st, 1900, and a copy of an injunction of the district court in this matter, enjoining and restraining this petitioner

from making any opposition to said motion, said injunction expressly prohibiting this petitioner by name 'from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson & Co., in any State court and especially in action No. 19944 entitled L. Comingor, &c., *vs.* Simonson, Whiteson & Co., pending in the Jefferson circuit court.' A certified copy of said injunction and said notice are hereby filed herewith as part hereof, marked Exhibits Nos. 5 and 6 respectively. All of which the State court took under advisement. Also Exhibit No. 4 therewith."

7. Also the words: "That the receiver in bankruptcy was applying to the State court as shown, and your petitioner was restrained from opposing or appearing in response to said notice."

8. Also the words: "On the same day that said response was filed, June 30th, 1900, the Jefferson circuit court declined
55 to entertain said bankruptcy receiver's motion hereinabove shown to withdraw funds from the court, because said receiver was not a party to the action and said court suggested that the motion would be entertained when said receiver filed its petition asserting claim to the fund as provided in section 29 Kentucky Code of Practice. Said ruling of the court is in writing and a copy thereof is filed as part hereof, marked Exhibit No. 11;" and Exhibit No. 11 therewith.

9. Also the words: "Did on the 3rd day of July, 1900, file a claimant's petition under said Kentucky Code provision, in the circuit court making himself a party to said action, having been directed so to do by the order of the referee in bankruptcy. A copy of said petition and exhibits attached thereto, including the said referee's order are filed as parts hereof, marked Exhibit No. 12. Thereafter on July 5, 1900, said trustee in bankruptcy tendered his proposed order for withdrawal of said fund accompanying the same with notice to petitioner's counsel and their response whereupon the court made him a party and entered the motion for leave to withdraw the funds then in said court, and sustained his motion and gave said trustee leave to withdraw, which was done. A copy of said motions or order and the notice to petitioner's counsel and their reply is filed as part hereof, marked Exhibit No. 13;" and Exhibit No. 13 therewith.

10. Also the words: "From all of which it appears that the trustee in bankruptcy became a party to the petitioner's suit for settlement in the State court, made it appear to said court that all its officers, including petitioner and his counsel were paid and the fund remaining in said court would be distributed among the creditor beneficiaries of said deed of assignment and thus obtained the said fund for distribution in bankruptcy herein. At the same time, whilst this was being done, the petitioner was under injunction from the district court herein as already shown, preventing any action on his part in said State court, and at the same time was being pressed by said show-cause rules of the referee in bankruptcy to surrender his commission and pay back the money expended by him in paying counsel before any bankruptcy proceedings, his re-

sponse to said rules, among other things, showing that the State court suit was pending and he was within that jurisdiction making his settlement."

And thereof prays judgment of the court.

TYLER BARNETT AND
AUGUSTUS E. WILLSON,
Solicitors for said Trustee.

56 Notice of the foregoing objections and motions by copy thereof delivered Feb'y 11th, 1901, is acknowledged and further notice waived.

——— ———,
Of Counsel for Leonard Comingor, Petitioner.

943. Motion to strike out. Filed Feb. 12, 1901. Frank O. Loveland, clerk.

United States Circuit Court of Appeals, Sixth Circuit, at Cincinnati.

SINSHEIMER, LEVENSON & COMPANY, FREEMAN Brothers, and N. Snellenburg & Co.
vs.
SIMONSON, WHITESON & Co. } In Bankruptcy.

Answer and Affidavit of the Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

The Louisville Trust Company, trustee in bankruptcy of the estate of Simonson, Whiteson & Co., bankrupts, for answer to the petition filed in the above-styled proceeding, and by way of affidavit for certiorari in the event that the petition should not be dismissed, states and deposes as follows:

Said trustee denies that nothing was alleged against said Comingor in the petition in involuntary bankruptcy, referred to in the petition filed herein, except that he was assignee for the creditors; denies the allegation in said petition for review that no further notice was taken of him in said bankruptcy proceeding or no action taken on his motion to dismiss or offer to answer, and states that said proceeding as to said petitioner remains in full force, and that the petitioner has never applied to the court to decide or dispose of his motion to file his answer therein or his motion to dismiss said proceeding as to him, or to offer to answer, and denies the allegation that in all proceedings subsequent to said motion to dismiss, he was simply dropped out of the case by common consent, or dropped out of it at all, and states he is still a

57 party to said proceeding, and the issues between him and the petitioning creditors in involuntary bankruptcy are not disposed of and have never been disposed of, and denies the allegation of petitioner that he was never treated or considered as a party to said bankruptcy proceedings by the court or the parties since March, 1899, in said district court, or that the orders, pleadings and records

will so show, and denies that the record in this court No. 716, page 20, paragraph 3, so shows, and denies that the order of the referee in bankruptcy on the 28th day of May, 1900, was without appearance of the petitioner, and states that at the time said order was made, said petitioner, L. Comingor, was represented before said referee by his attorneys, M. A., D. A. & J. G. Sachs, and denies that it appeared from his itemized account that he had, before any proceedings in bankruptcy, realized on all the assets of the bankrupts under direction and order of the State court or at all before any petition in bankruptcy, and denies that it showed that he drew as his commissions $3,398.90 or any other sum or paid his counsel for necessary services $3,200.00 before any proceedings in bankruptcy, or that it showed anything in regard thereto except that he had, as assignee under the assignment for the benefit of creditors in the State court, collected a large sum of money and had credited himself without any authority or order of court or permission so to do, with the sum of $3,398.90 commissions and $3,200.00 paid counsel. It did not show what the services of his counsel were, nor that they were necessary, much less that they were ever allowed by any court, or that there was any motion or proceeding to allow the same or any part thereof, or any authority therefor, except the entering of the same by himself in his own account, or that he ever held any of the money collected by him in any capacity or by any authority, except as such assignee, or that he ever had any personal title, claim or right to any of said money with which he charged himself in said account, or any right to retain the same or any part thereof until so ordered by the State court, and denies that the rule against the petitioner to pay the receiver the money retained by him, Exhibit No. 3, was made *sua sponte* by the referee, and denies that the order by the referee of June 28, 1900, Exhibit No. 9, was entered by the referee *sua sponte* or in any other way except upon the application of the trustee in bankruptcy, and denies that the petitioner, Leonard Comingor, is still subject to the jurisdiction of the State court or can be required to settle his accounts in
58 that court, and denies that it appears from the matters set forth in the petition for review or at all that the trustee in bankruptcy became a party to the petitioner's suit for settlement in the State court, or made it appear to said court that all its officers, including petitioner and his counsel, were paid or that the fund remaining in said State court would be distributed among the creditor beneficiaries of said deed of assignment, or that it was by making any such state of facts appear, that said trustee obtained said fund for distribution in bankruptcy herein, and denies that said trustee in its proceedings in the State court, made it appear to the State court, or that it did appear to the State court that petitioner and his counsel were paid, or that any representation or allegation was made in reference to the payment of petitioner or his counsel, and on the contrary, said trustee states that the attention of the State court was called by Mr. M. A. Sachs, then one of the members of M. A., D. A. & J. G. Sachs, attorneys in said proceeding in the State court for said Comingor, that the State court had not fixed any

allowance for the said Comingor as assignee, and his counsel, and the judge of the State court, the Hon. Emmett Field, then and there ruled and said in open court to petitioner, who was present in court, and his said counsel, that the State court, on account of the bankruptcy proceedings, would not consider nor decide upon any compensation for the petitioner, Leonard Comingor, or his said counsel, but that that matter must be disposed of by the bankruptcy court, but no entry of record was made thereof, because no application had been made by the petitioner, Leonard Comingor, or his said counsel, for any order making any fees or allowances to them, beyond the order referring the case to the commissioner, which was not executed nor carried out, and denies that the petitioner was, at the time of making of any of the orders by the referee in this proceeding, within the jurisdiction of the State court or making any settlement therein, or that the State court had any longer any jurisdiction of the settlement of the accounts of said Leonard Comingor, assignee, and states that said State court had expressly refused to take jurisdiction to settle said accounts, and had expressly ruled that the whole matter was within the jurisdiction and subject to the control of the said district court of the United States in said bankruptcy proceedings.

And the said trustee further states that said Leonard Comingor and his said attorneys, M. A., D. A. & J. G. Sachs, appeared in person and by counsel before the district court of the United
59 States and the referee in bankruptcy and submitted to the jurisdiction of said district court and referee in bankruptcy in all of said proceedings with reference to the payment by said Comingor into court of said moneys, which his accounts show he had received and retained without authority, and were represented by counsel therein in all of said proceedings, and applied to the court to allow said Comingor to retain said sums retained by him for his compensation and for that of his counsel, and cross-examined witnesses, and said Comingor testified upon said issues in his own behalf and produced the testimony of M. A. Sachs, D. A. Sachs and many other witnesses in his own behalf, and cross-examined witnesses for the trustee in bankruptcy, in which taking of testimony in said action, there was a great deal of time, work and expense incurred, a great number of witnesses examined and several hundred pages of depositions taken, filed and paid for, and the taking of all testimony and production of evidence upon said issues, both on behalf of said trustee in bankruptcy and the petitioner, Leonard Comingor, was finished and completed before the petitioner, Leonard Comingor, ever in any way objected to the jurisdiction of the said district court of the United States and referee in bankruptcy over said matters, and said trustee denies that this whole proceeding or any part thereof is illegal or in conflict with the provisions of the bankruptcy law; denies the allegation that neither the referee nor the district court has any jurisdiction of the petitioner or of the subject-matter in controversy, and states that no objection to the jurisdiction of said district court or referee was ever made until long after said Comingor had submitted to the jurisdiction of that

court and had applied to it to authorize him to retain said sums of $3,398.90 as his compensation and $3,000.00 which he alleged he had paid to said M. A., D. A. & J. G. Sachs, as attorneys.

The said trustee further deposes and states that the opinion of the referee accompanying the report, Exhibit No. 18, is material to the proper determination of this action, and has been omitted; and denies that the petitioner is justly aggrieved or is injured by said orders of the district court, and states that said court had jurisdiction of said Comingor, assignee, in said original petition in involuntary bankruptcy; that he was before the court therein and submitted to its jurisdiction, and tendered his answer and afterwards applied to said referee and district court to allow him said sums which he had collected and not paid into court, to wit: $3,398.90 and
60 $3,000.00 for his services and expenses as assignee under said assignment for the benefit of creditors.

Said trustee for further answer states that said Comingor never had any claim to any of said moneys collected or retained by him, except as assignee under the laws of the State of Kentucky, and under the orders and proceedings of said circuit court of the State of Kentucky, for Jefferson county, and no right or title to any of the moneys so collected, received or retained by him, as such assignee, in his personal right, nor had his attorneys any right thereto, or to any part thereof until allowed by the court having jurisdiction of the fund; that he had no right to retain anything on account of his compensation for his own services, or payment to his attorneys; that no order was ever entered authorizing him to retain any sum on account thereof, nor to pay any expenses except the expenses of carrying on the store and disposing of the property of the assigned estate, and that said State court, upon being advised by the transcript of the record, of said adjudication in bankruptcy, held and decided that it had no longer jurisdiction of said fund or any part thereof, except so much as was necessary to pay its clerk and commissioner, which was paid, and expressly refused to pass upon any question of any allowance to the said Comingor for his own compensation or for his attorneys' fees, and expressly ordered said Comingor, as it had the right to do, to submit to the judgment of the said district court in said bankruptcy proceedings upon said questions of his compensation and his attorneys' fees, and that it was in obedience to that requirement of the State court that he appeared in said bankruptcy proceedings after said trustee was appointed receiver, and subsequently trustee, and filed his account in the bankruptcy court before the register, with the items for his compensation, and his attorneys' fees, and applied to said district court and referee to allow the same and permit him to be credited with said amounts; that the State court has expressly refused to take jurisdiction of said questions of the compensation of said Comingor and his attorneys' fees, and declared that he must submit to the jurisdiction of said bankruptcy court in regard to said matters, and that said Comingor had no title in his own right to any of said money and no further right nor power to apply to the said State court for an allowance for his compensation or attorneys' fees, nor to any other court but the court

in bankruptcy, and that the said State court required him to submit to said bankruptcy court in said bankruptcy proceedings in the question of such allowance and that he had no right nor
61 title to said money nor any part thereof, and made no claim thereto except that as assignee of the trust fund, he requested the said court in bankruptcy to allow him said compensation, and that he was bound by said requirement of said State court to submit to said bankruptcy court in said proceedings said, claims for allowance for compensation and attorneys' fees.

Said trustee denies that said bankruptcy court erred in holding that the referee and said district court had jurisdiction and power to proceed against the petitioner, or that he was a third party, or anything but holder of the fund for the bankrupt firm and subject to the jurisdiction and control in regard thereto of the court having custody of said fund, and he denies that the court erred in holding that it had jurisdiction and power upon the proceedings, orders and recommendations of the referee, to adjudge said Comingor in contempt or order him to pay said money and punish him for contempt. Said trustee denies that said court erred in holding that the referee had jurisdiction and power to proceed against said Leonard Comingor in the summary manner, or in holding that said Leonard Comingor held said money for the bankrupts and could be proceeded against in such summary manner, or in holding that it had the power and jurisdiction to grant and issue the injunction against said Leonard Comingor, and said trustee states that said Leonard Comingor, petitioner, was before the court in said bankruptcy proceedings from the filing of the petition in involuntary bankruptcy, and service of the subpœna upon him therein; that the court took jurisdiction of him, and that he made no objection nor exception to the order of injunction against him referred to in his petition; and denies that the court erred in holding that said referee had the power or jurisdiction to issue said show-cause orders or rules thereon or proceedings against said Leonard Comingor in the manner had upon said orders issued; or that said district court erred in holding that the filing of the responses of said Leonard Comingor, gave said referee or court jurisdiction or power to proceed thereon, or that said referee and said district court erred in adjudging said responses and each of them insufficient, or in finding the facts to be or adjudging that said sums of money were the property of the bankrupts' estate, and that said Leonard Comingor never claimed title to any of it, nor made any claim of right to it, or ownership thereof at any time, and never claimed to have converted it to his own use, or to have claimed it adversely to the bankrupts or the trustee or the receiver in
62 bankruptcy, and states that said Comingor never did claim any title or right to any of said money, except as assignee of, and in that capacity agent of said bankrupt firm, and could not of right claim any part of it until such part should be set aside by some court having jurisdiction of the fund, which was never done, and had no right nor power to claim to have converted any part of it to his own use, or to have claimed it adversely to the bankrupts, or the trustee or the receiver in bankruptcy until allowed by some court

having jurisdiction of that fund, and no such allowance was ever made, and that said Comingor had no jurisdiction, authority, power or right whatever to retain or claim in his own right any part of the money held by him as trustee or assignee under said assignment for the benefit of creditors and subject to the court having jurisdiction thereof, nor any right nor claim to plead or assert or allege that any money held by him in such trust was converted to his own use, and denies that the district court erred in adjudging that said money was not converted by said Leonard Comingor to his own use, but was held for the benefit of the trustee, and denies that the court erred in adjudging that said Leonard Comingor was properly before the court in said proceedings, or in failing to dismiss said contempt proceedings against said Comingor, or in failing to discharge him, or in finding as a fact and adjudging that said Comingor was a party to this proceeding in bankruptcy, or in adjudging and ordering that said Leonard Comingor pay said sums of money to the receiver, afterwards the trustee, in bankruptcy, in the summary manner had, or after ordering said receiver and trustee to make itself a party to the State court proceeding, or after that was done, or after the receiver and trustee became a party to the State court proceeding and withdrew all the money paid into the State court by said Leonard Comingor.

Said trustee further states that the State court never made any order, decision or other proceedings dividing said money collected by said Comingor as assignee and reported in his accounts filed herein into any separate funds, nor did it order him to pay any of said money into court; but that his proceedings paying certain large sums of money into the State court, were taken and had by him, and said moneys paid in by him voluntarily without any order of the State court, in an effort to defeat the jurisdiction of said district court in bankruptcy, and that there never was any decision in the State court that in any way recognized or advised the State court of,

63 any division by said Comingor of said funds collected by him as assignee, or any retention of any part thereof by him on his own account or for his attorneys' fee, or any conversion of any part of said fund to his own use, or any distinction in the manner of holding the said trust fund or any part thereof by him, between the said sums which he now claims on account of his compensation and attorneys' fee, from any other part of the fund, or any determination or recognition in any way by said State court of any right or claim of said Comingor individually to any part of said fund, or any authority to expend any part of the same for his compensation or his expenses for attorneys' fee, or any recognition of any distinction or discrimination between the moneys said Comingor paid into said State court and the moneys which he did not pay in, and denies that said district court erred in holding that the proceedings therein against petitioner, Comingor, were equivalent to a plenary proceeding against him, or in holding that the acts or proceed-s therein by or in behalf of said Comingor, amount to or are equivalent to or constitute, a consent to the jurisdiction of the referee in bankruptcy and the district court therein under said proceedings against petitioner.

Said trustee further states that said petitioner, Leonard Comingor, before ever objecting or excepting in any way to the jurisdiction of said district court and referee in said bankruptcy proceeding over the said funds in his hands or over him and his said attorneys, M. A., D. A. & J. G. Sachs, gave his deposition in said proceeding on Sept. 16, 1899, for the defendants in said involuntary petition in bankruptcy, which is a part of the printed record, No. 777, in this court, at pages 53–63, inclusive, and that he engaged with his counsel in taking depositions upon the said issues with him herein, attending in person or by counsel at the following depositions:

At the deposition of C. M. S. Hebel, for the trustee, July 19, 1900, pages 1–5.

At his own deposition, for himself, July 19, 1900, pages 6–36, inclusive.

At deposition of M. A. Sachs, for said Comingor, July 19, 1900, pages 37–47, inclusive.

At deposition of W. F. Turner, for said Comingor, July 20, 1900, pages 48–60.

At deposition of Ben. C. Weaver, for said Comingor, July 20, 1900, pages 60–67.

At deposition of W. W. Watts, for said Comingor, July 20, 1900, pages 67–76.

64 At deposition of Leonard Comingor, July 24, September 24, 27th, 28th, October 1st and 2nd, 1900, being examined in behalf of Louisville Banking Company. He also attended, in person, or by counsel, at the following depositions:

At deposition of S. J. Spalding, July 24, 1900, pages 77–83.

At deposition of George Buechel, July 24, 1900, pages 83–90.

At deposition of Albert Schranz, July 24, 1900, pages 90–95.

At deposition of W. W. Webb, July 24, 1900, pages 95–97.

At deposition of Gus Rothenburger, July 27, 1900, pages 98–110.

At deposition of Samuel W. Botts, July 27, 1900, pages 111–113.

At deposition of D. A. Sachs, July 27, 1900, pages 113–132.

At deposition of Joseph Dinkelspiel, October 1, 1900, pages 134–141.

At deposition of Louis Dinkelspiel, October 1, 1900, pages 141–145.

At deposition of John A. Stratton, October 1, 1900, pages 145–147.

At deposition of Alex. Myers, October 1, 1900, pages 147, 148.

At deposition of Mark Sales, October 1, 1900, pages 149–162.

At deposition of Theodore Harris, October 2, 1900, pages 163–181.

At deposition of J. Lewis Williams, October 2, 1900, pages 181–'2.

At deposition of Frank B. Stouffer, October 2, 1900, page 183.

At deposition of R. W. Croxton, October 4, 1900, pages 184–'7.

At deposition of J. M. Andrew, October 4, 1900, pages 187–'8.

At deposition of R. B. Gelatt, October 4, 1900, pages 188–'9.

At deposition of S. S. Meddis, October 4, 1900, pages 190–'1.

At deposition of F. B. Stouffer, October 6, 1900, page 191.

At deposition of N. Bierman, October 10, 1900, pages 197–208.

At deposition of C. M. S. Hebel, October 10, 1900, pages 209–'10.

At deposition of S. M. Goldsmith, October 10, 1900, pages 210–221½.

65 At deposition of Theodore Harris, October 10, 1900, pages 222–230.

That it is necessary and material to the consideration and proper decision of this cause, and the petition of said Comingor for review herein, for the court to know all of the acts and doings of said Comingor in said proceeding before the said district court and referee in bankruptcy in order to show the fact and said trustee states that it is true that said Leonard Comingor, petitioner here for review, never made any application to any other court than said district court in bankruptcy for any allowance out of the funds which he held as assignee of Simonson, Whiteson & Co., for compensation for his own services, of those of his attorneys, and never had any allowance by any court therefor, and never had any title or claim to hold any of said moneys of said bankrupt firm collected and received by him in any capacity, except as assignee and trustee for the benefit of the creditors of said firm, and cannot claim here that he had converted or appropriated any of said funds collected, received or held by him as trustee, without applying to this court to believe him guilty of unlawful, wrongful and unpermitted misappropriation and conversion of said trust funds in his hands to his own use in order to defeat the jurisdiction of the said district court and referee in bankruptcy, and that he cannot plead or claim any adverse title or any personal right of any kind to any of said funds, which he now claims to have retained for his compensation and the compensation of his counsel, without pleading his own wrong and breach of trust in order to exclude the jurisdiction of the said district court and referee in said bankruptcy proceeding, and that he never did make any such claim or any claim that he had any right to retain any part thereof, or that the State court or any court had ever made him any order of allowance of any part thereof, nor did his said lawyers, M. A., D. A. & J. G. Sachs, make any such claim, but on the contrary his said lawyers expressly agreed before the referee that if the referee would not report them to the district court for failure to comply with the rule for them to pay in the $[illegible] that they would pay any order made against the assignee, Leonard Comingor, which they have heretofore failed to do, and that said assurance was given by said M. A., D. A. & J. G. Sachs, through M. A. Sachs, in the presence and with the permission of Leonard Comingor, petitioner herein, and said trustee, through its president, says that if a transcript of the record herein referred to, and especially the depositions hereinbefore named,

66 were filed as part of the appellate proceedings of the petitioner in this court, they would show the facts found by the referee, that the said petitioner had not managed the said estate faithfully nor for the best interest of the creditors, but had colluded and combined with the bankrupts and certain favored creditors of the bankrupts, to sell property of the bankrupt estate amounting to a great sum, to wit, $60,000.00, for the sum of $15,000.00, under an arrangement and agreement by which the favored creditors were to be paid fifty cents on the dollar, and the surplus of the proceeds of that operation after paying such creditors fifty cents on the dollar,

which was afterwards fixed at payment in full, should be divided between the bankrupts, and that after said arrangement was carried out, a large sum was divided among the bankrupts as profits of the wrecking of their business, and that the proceeding by which said remainder of the property of the said bankrupt firm was sold as a remnant, was made possible by the unfaithfulness of said assigned to his duty as trustee for the benefit of creditors to said bankrupt firm, and that the services of said assignee and his attorneys, instead of being beneficial to the estate, were in the highest degree injurious to the estate as shown in the report and opinion of the referee thereon. The following deposition- and parts of depositions are material and necessary for the proper determination and decision of the matters involved in the petition for review filed herein by said Leonard Comingor, all of which are about to be filed in this court, as a part of the transcript of the record on the appeal of D. L. Newborg & Son, and Stern, Falk & Co., creditors of said bankrupts, who filed their claims before said referee in said proceeding, and whose claims were disallowed by the referee, which action of the referee was approved and confirmed by the said district court in said proceedings, and will be part of the printed record in that proceeding, which could be read herewith when the same shall be printed, as there is no need of having them copied and printed twice, and all of said depositions and parts of depositions were produced and read before the referee and the court and considered by the referee and the court in the decision against said petitioner, Leonard Comingor, viz:

The deposition of Isadore Whiteson.

The deposition of L. Comingor, in his own behalf.

The second deposition of said L. Comingor, on the examination conducted in behalf of the Louisville Banking Company.

The deposition of M. A. Sachs.

67 The deposition of W. F. Turner.

The deposition of Ben. C. Weaver and W. W. Watts, for said Comingor.

The deposition of C. M. S. Hebel, for the trustee in bankruptcy.

The deposition of S. J. Spalding, for said Comingor.

The deposition of George Buechel, for said Comingor.

The deposition of Albert Schranz, for said Comingor.

The deposition of W. W. Webb, for said Comingor.

The deposition of Gus Rothenburger for said Comingor.

The deposition of Samuel W. Botts, for said Comingor.

The deposition of D. A. Sachs, for said Comingor.

The stipulation between counsel in taking those depositions, pages 46 and 133, and the following depositions for the trustee, to wit:

The deposition of Joseph Dinkelspiel.

The deposition of Louis Dinkelspiel.

The deposition of John A. Stratton.

The deposition of Alex. Myers.

The deposition of Mark Sales.

The deposition of Theodore Harris.

The deposition of J. Lewis Williams.

The deposition of Frank B. Stouffer.
The deposition of R. W. Croxton.
The deposition of J. M. Andrew.
The deposition of R. B. Gelatt.
The deposition of S. S. Meddie.
The deposition of F. B. Stouffer.
The deposition of N. Bierman.
The deposition of C. M. S. Hebel.
The deposition of S. M. Goldsmith.
The deposition of Theodore Harris.

Your petitioner further deposes and says that said Comingor has omitted the following parts of the record and proceedings before said district court in bankruptcy and said referee, which are necessary or material to a correct understanding, knowledge, decision and determination of the issues, which he asks this court by his petition herein to decide, namely:

The order of the referee, June 20, 1900, filing his report of receipts and disbursements.

He omits to state that during the proceeding before the referee, Mr. M. A. Sachs requested the referee not to report to the court his failure to comply with the rule against M. A., D. A. & J. G. Sachs, assuring the court that if Comingor was required to pay it, the Sachses would pay it for him.

68 He omits all of the depositions taken under the order of reference by the district court, made July 16, 1900, as follows: The depositions of Isadore Whiteson, some 93 pages, and exhibits of W. E. Ambrose, J. W. McGinn, Louis Zapp, A. N. Jamison, Jos. McGee, Albert Metzler, Geo. W. Harrington, C. M. S. Hebel, L. Comingor, M. A. Sachs, W. F. Turner, D. A. Sachs, Joseph Dinkelspiel, Louis Dinkelspiel, John A. Stratton, Theodore Harris, L. Lewis Williams, F. B. Stouffer, R. B. Gelatt, S. S. Meddie, N. Bierman, S. M. Goldsmith and others, with exhibits, which are too lengthy to be copied in time to file with this affidavit, but all of which were read on the hearing before the referee and the court on said rules.

He omits the order of the referee Nov. 23, 1900, filing stipulation as to evidence read and the stipulation itself.

He omits the order of the referee of November 24, 1900, submitting the case and giving two weeks to all parties to file briefs and two weeks' time to file exceptions to depositions.

He omits the motion entered November 24, 1900, before the referee by M. A. Sachs, to set aside the order of court requiring them to pay into court $3,000.00.

He omits the response of M. A., D. A. & J. G. Sachs, filed before the referee June 27, 1900.

He omits the certificate of the referee filed June 30, 1900.

He omits the referee's opinion filed with his report.

Wherefore, said Louisville Trust Company, trustee in bankruptcy, prays that the court will require said petitioner, Leonard Comingor, to supply said omitted parts of the record herein, or rather to file herein a complete transcript of the record of all of the pleadings, orders, proceedings and evidence in said district court and before

said referee in bankruptcy in the matter of said proceedings against Leonard Comingor, assignee, and further prays that the petition for review herein be refused and dismissed at the petitioner's cost and for its costs and all proper relief.

TYLER BARNETT AND
AUGUSTUS E. WILLSON,
Attorneys for the Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Company.

STATE OF KENTUCKY, } ss:
County of Jefferson, }

H. V. Loving makes solemn oath and says that he is president of the above-named corporation, The Louisville Trust Company,
69 trustee in bankruptcy of Simonson, Whiteson & Co., bankrupts, defendant to the petition of Leonard Comingor, referred to in the foregoing answer and affidavit for a writ of certiorari for diminution of record, and that the foregoing answer and affidavit is not interposed for delay and the same is true in point of fact.

H. V. LOVING.

Sworn to and subscribed before me this 11th day of February, A. D. 1901. My commission expires Jan'y 27, 1902.

[SEAL.] NORA KIRCH,
Notary Public in and for Jefferson County, Kentucky.

I hereby certify that in my opinion the foregoing answer and affidavit for a writ of certiorari for diminution of record is well founded in point of law.

____ ____,
Of Counsel for Defendant to the Petition.

943. Answer and affidavit. Filed Feb. 12, 1901. Frank O. Loveland, clerk.

70 And afterwards, to wit, on February 12th, 1901, a motion to advance, etc., was filed, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

In the Matter of Bankruptcy of Sinsheimer, Levenson & Co. *vs.* Simonson, Whiteson & Co.	Petition of Leonard Comingor for Review.

Motion.

Come- petitioner, Leonard Comingor, by his attorneys, D. A. Sachs and Wm. M. Smith, and files notice and moves the court to advance the hearing of this petition for review to such a day in the present February term of this court as may suit its convenience, and to grant a hearing thereon as speedily as possible and submission

thereof, and to make such orders as the court may deem necessary to suspend the execution of the judgment entered in the district court of the United States for the district of Kentucky in this case, on January 26th, 1901, requiring said petitioner, Comingor, to pay to the Louisville Trust Company, trustee in bankruptcy herein, $3,398.90 and $3,000 on or before February 16, 1901, until the matter comes to be heard by this court and determined herein.

United States Circuit Court of Appeals for the Sixth Circuit.

In the Matter of Bankruptcy of Sinsheimer, Levenson & Co. *vs.* Simonson, Whiteson & Co.	Petition of Leonard Comingor for Review.

Notice.

71 Hon. Augustus E. Willson, attorney for Louisville Trust Company, trustee for Simonson, Whiteson and Company:

You are hereby notified that in the court-room of this court, at Cincinnati, Ohio, on Tuesday, February the 12th, 1901, at the opening of the said court or as soon thereafter as counsel can be heard, I will, through my counsel, move this court to enter an order herein advancing the hearing of the petition for review filed herein in this court by me on January 28th, 1901, a copy of which has been heretofore furnished you, to such a day in the present February term as suits the convenience of the court, and that on the day fixed by the said court a hearing may be then granted thereon and a submission thereof had, and I will, through my counsel, at the same time and place, move this court for an order suspending the execution of the judgment entered in the district court of the United States for the district of Kentucky on January 26th, 1901, requiring me to pay to said Louisville Trust Company, trustee in bankruptcy herein, the sum of $3,398.90 and $3,000 on or before February 16th, 1901, and for such other and further orders as this court shall deem meet and proper and shall grant, suspending all proceedings against me in said district court of Kentucky in this matter pending this petition for review and until the further order of this court.

LEONARD COMINGOR,
By M. A., D. A., & J. G. SACHS AND
W. M. SMITH, *His Attorneys.*

Executed on Augustus E. Willson, attorney for Louisville Trust Company, trustee for Simonson, Whiteson & Co., on February 5th, 1901, at 9½ o'clock a. m., by delivering to him in person a
72 true copy of the within notice. I am personally acquainted with said Willson. I am a citizen of the United States. I am not of kin to any of the parties and am not interested herein.

EDWARD C. MUMPHRIE.

Subscribed and sworn to before me by Edward C. Mumphrie this 5th day of February, 1901.

My commission expires January 6th, 1904.

D. A. SACHS,

[SEAL.] *Notary Public in and for Jefferson County, Kentucky.*

And on the same day, to wit, on February 12th, 1901, an order was entered in said cause, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

SINSHEIMER, LEVENSON & Co. *vs.* SIMONSON, WHITESON & Co. } Petition of Leonard Comingor for Review.

Comes petitioner Leonard Comingor, by his attorneys, D. A. Sachs and W. M. Smith, and filed notice and files and enters motion and moves the court to advance the hearing of this petition for review to such a day in the present February term of this court as may suit its convenience, and to grant a hearing thereon as speedily as possible and a submission thereof, and to make such orders as the court may deem necessary to suspend the execution of the judgment
73 entered in the United States district court at Louisville herein on January 26, 1901, requiring petitioner Comingor to pay the Louisville Trust Co., trustee herein, $3,398.90 and $3,000 on or before February 16th, 1901, until the matter herein on review may be heard and determined herein by this court, and the trustee, by Augustus E. Willson, attorney, filed notice and motion referred to therein objecting to petitioner's motion and moving to dismiss the petition on grounds set up in the motion, and also to strike out parts of the petition, and also answer and affidavit of said trustee for a writ of certiorari for diminution of the record, and move- the court to grant it said writ.

Thereupon it is ordered and adjudged by this court that the judgment rendered in the district court of the United States for the district of Kentucky, at Louisville, Kentucky, on January 26, 1901, requiring the petitioner, Leonard Comingor, to pay to the Louisville Trust Co., trustee in bankruptcy herein, the sum of $3,398.90 and $3,000 on or before February 16th, 1901, and all proceedings in said district court pending as against said Comingor on said matter be, and the same is hereby, stayed and suspended until the further orders of this court.

And it is ordered by the court that said trustees shall have until Monday, February 18, 1901, to print its said motion, answer, and affidavit, and this order and time is hereby given both petitioner and defendant in error until the day of the hearing of the petition on review to file briefs on said review.

And afterwards, to wit, on February 15th, 1901, the affidavit of Leonard Comingor was filed, clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

SINSHEIMER, LEVENSON & COMPANY
vs.
SIMONSON, WHITESON & COMPANY. } Affidavit.

In the matter of the petition of Leonard Comingor to review an order of the district court of the United States for the district of Kentucky.

The petitioner and affiant, Leonard Comingor, says on oath that his insolvency, as shown in his responses on pages 18 and 21 of this record, still exists, and he says that he is utterly unable to comply with the judgment of the district court requiring him to pay to the Louisville Trust Company, trustee herein, the sums of $3,398.90
74 and $3,000 or either of said sums or any part thereof. He says that he has no means and no possible way by or from which he could raise the money to pay said trustee or bring it into court, and all of this because of the great financial embarrassment under which he is now laboring. He says he is unable on account of his poverty, want of assets, and financial embarrassment aforesaid to give security for the money or execute any bond for a stay of these proceedings against him or to execute a supersedeas bond herein.

LEONARD COMINGOR.

STATE OF KENTUCKY, } *sct:*
County of Jefferson, }

I, Edward C. Mumphrie, a notary public in and for the county and State aforesaid, do hereby certify that on this day the foregoing affidavit was subscribed and sworn to before me by Leonard Comingor. My notarial commission expires at the expiration of the next senate of Kentucky.

In testimony whereof witness my signature and official seal this 14th day of February, 1901.

EDWARD C. MUMPHRIE,
[SEAL.] *Notary Public in and for Jefferson County, State of Kentucky.*

And afterwards, to wit, on February 23, 1901, an order was entered in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

In the Matter of the Petition of LEONARD COMINGOR.

Before Lurton & Severens, JJ.

The motion in this cause to advance the same for hearing
75 is granted, and is set as the second cause for hearing at the March session.

The motions to dismiss the petition and to add to the record are both denied.

And afterwards, to wit, on March 5th, 1901, an entry was made upon the journal of said court in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

In the Matter of the Petition of LEONARD COMINGOR.

Before Judges Lurton, Severens, and Clark.

This cause is argued on behalf of the petitioner by Mr. Wm. M. Smith, and for the defendant by Mr. Augustus E. Willson and submitted.

And afterwards, to wit, on April 2nd, 1901, a decree was rendered in said cause, which reads and is as follows:

Decree.

76 United States Circuit Court of Appeals for the Sixth Circuit.

In re COMINGOR. No. 943.

Petition to review an order in bankruptcy by the district court of the United States for the district of Kentucky.

This cause came on to be heard on the petition to review an order of the district court of the United States for the district of Kentucky and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order and decree of the said district court in this cause confirming the orders of the referee requiring this petitioner to pay the trustee the sums of $3,398.90 and $3,000 respectively be, and the same is hereby, reversed with costs with directions to said district court to set aside said order and decree, and that the orders of the referee making absolute the orders made by him directing the petitioner Comingor to pay the trustee in bankruptcy the moneys mentioned in said orders so confirmed, as aforesaid, be vacated and set aside.

77 And afterwards, to wit, on April 10th, 1901, an opinion was filed in said cause, which is clothed in the words and figures as follows:

Opinion.

78 United States Circuit Court of Appeals, Sixth Circuit.

SINSHEIMER, LEVENSON & COMPANY
v.
SIMONSON, WHITESON & COMPANY, *ex Parte* LEONARD COMINGOR. } No. 943.

Petition of Leonard Comingor for the review of certain orders of the district court of the United States for the district of Kentucky.

Submitted Mar. 5, 1901; decided April 2, 1901.

Before Lurton and Severens, circuit judges, and Clark, district judge.

This petition for review relates to a case in bankruptcy which has been twice before this court upon appeals which concerned the adjudication of Simonson, Whiteson & Company as bankrupt. 95 Fed., 948, and 100 Fed., 426. The adjudication was made on the 20th day of September, 1899. The ground thereof was that Simonson, Whiteson & Co. had within four months preceding the filing of the petition made a general assignment under the statutes of Kentucky for the benefit of creditors to Comingor, the present petitioner for review. Comingor, who was made a party to the petition for the adjudication, tendered an answer, which appears never to have been filed. The reason for not permitting it to be filed does not very clearly appear. Upon the order adjudging the company bankrupt being made, the matter was referred to a referee. The Louisville Trust Company was appointed receiver, and was directed by the court to apply to the Jefferson circuit court, a State court of Kentucky, which had charge of the proceeds of the assigned prop-
79 erty already converted into money under the direction of that court, for an order to pay over to the receiver the funds so in its hands.

On a day prior to the making of this order, the bankruptcy court made another order on the bankrupts and on Comingor "and all persons to whom notice may come" enjoining them "from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson & Co. in any State court, and especially in action No. 19944—pending in Jefferson circuit court," the case mentioned being the one in which the assignment was being administered. The trust company was allowed by the State court to become a party to the action and leave was granted to file its petition for the purpose aforesaid. This petition recited the proceedings in the bankruptcy court up to that time, including the injunction restraining the bankrupt, Comingor and others, and made claim to the fund. The attorney for the trust company served notice of the intended presentation of the petition upon the bankrupt and upon Comingor. The latter conceiving himself bound by

the injunction, interposed no objection. On the 30th day of June, 1900, the petition was granted and the funds turned over.

Meantime, on May 28, 1900, the court made the following order:

"In the Matter of SINSHEIMER, LEVENSON & Co., ETC.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

"At Louisville, in said district, on the 28th day of May, A. D. 1900, before John B. Baskin, referee in bankruptcy.

"No notice having been given, and no adverse interest appearing it is hereby ordered that L. Comingor file with John B. Baskin, one of the referees of this court in bankruptcy, at his office, rooms 1001–5, Columbia building, Louisville, Kentucky, on or before June 16, 1900, at 9.30 o'clock a. m., a detailed and itemized statement showing all the receipts and disbursements made by him of money and other assets belonging to the estates of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, together with all vouchers that he may have for any disbursements.

"It is further ordered that said L. Comingor be and appear before the referee aforesaid in person on June 16, 1900, at 9.30 o'clock a. m., for the purpose of making settlement of his accounts as assignee of the parties aforesaid."

80 Not long thereafter Comingor presented the statement of account thus ordered. It showed his receipts to be $92,865.77, and his disbursements $86,099.24, showing a balance of $6,766.53 remaining in his hands. Among the disbursements were $3,000 paid to one attorney, $200 to another, and $3,300 to himself. On June 20, 1900, the referee made an order which includes the beginning of the proceedings now more particularly under review. So much of it as relates to the particular subject reads as follows:

"In the District Court of the United States for the District of Kentucky. In Bankruptcy.

"In the Matter of SINSHEIMER, LEVENSON & Co., ETC.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. WHITESON, and LEO Stern, Bankrupts.

* * * * * * *

"Said receiver is further authorized and directed to take charge of and hold until further orders of court all the assets of whatsoever kind and estates of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, and also to receive from D. Sachs the sum of $3,000, and from L. Comingor $3,398.90, and also from said Comingor the further sum of $6,766.53, and also from Zack Phelps the sum of $200.

"It is further ordered that said D. Sachs, L. Comingor and Zack Phelps be and appear before John B. Baskin, one of the referees of

said court in bankruptcy, at his office in the Columbia building, Louisville, Kentucky, on June 23, 1900, at 9.30 o'clock a. m., to show cause, if any they can, why they shall not be required to pay over to said receiver the sums aforesaid."

June 23, 1900, Comingor made the following response:

"SINSHEIMER, LEVENSON, ET AL.
vs.
SIMONSON, WHITESON, ET AL.

"Before Hon. John B. Baskin, referee.

"L. Comingor for response herein to the order to pay $3,398.90, says that, as shown in his report herein, he retained the same on account of his commissions as assignee before any bankruptcy proceedings, relying upon the fact that he would be entitled to more than that sum on final settlement; that for the services ren-
81 dered the estate herein he believes this honorable court will, on a full hearing, allow him at least said amount; that he is a man of no means, has used of said money from time to time, relying upon its being his, until he has none of it left. He says that he is unable to pay said money into court, having neither money or property of any kind. He says that he has recently made efforts to borrow or raise money and finds it impossible to do so. He asks the court for such relief in the premises as the court deems proper.

L. COMINGOR.

"Subscribed and sworn to before me by L. Comingor, June 23, 1900. My commission expires January 6, 1904.

"MORRIS A. SACHS,
"*N. P., Jeff. Co., Ky.*"

Upon the filing of this response the referee made the following determination:

"In the Matter of SINSHEIMER, LEVENSON & CO., ETC.,
vs.
SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

"At Louisville, in said district, on the 23d day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

"No notice having been given, and no adverse interest appearing, comes L. Comingor, by M. A. Sachs and Alex. P. Humphrey, his counsel, and files herein a response to the rule to show cause why he should not be compelled to pay $3,398.90 to the Louisville Trust Company, receiver in bankruptcy in this cause, and after hearing said counsel it is now ordered and adjudged that said response be, and the same is, hereby held insufficient, and the rule to show cause why he should not pay said sum as aforesaid is hereby made absolute. It is further ordered that said L. Comingor shall pay to the

Louisville Trust Company, receiver in bankruptcy, by 9.30 o'clock a. m., on Saturday, June 30, the said sum of $3,398.90.

"JOHN B. BASKIN,
"*Referee in Bankruptcy.*"

For some reason, not appearing in the record, the order to show cause made on the attorneys was not pursued, but on the 28th of June, 1900, another order was made on Comingor to show cause why he should not be required to pay to the receiver, the sums of money shown by his account rendered to have been paid to Sachs and Phelps, $3,200 in all. This order after having been entitled as before was in the following terms:

82 "At Louisville, in said district, on the 28th day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

"No notice having been given and no adverse interest appearing, it is ordered that L. Comingor be and appear before John B. Baskin, one of the referees in bankruptcy of the above court, at 9.30 o'clock a. m. on June 30, 1900, to show cause, if any he can, why he shall not be required to pay to the receiver in bankruptcy herein the sum of $3,000 recited in his report as having been paid to M. A., D. A. & J. G. Sachs, and also the further sum of $200 recited in said report as having been paid to Zack Phelps.

"JOHN B. BASKIN,
"*Referee in Bankruptcy.*"

Under the same title Comingor, on June 30, 1900, made the following response:

"L. Comingor, for response to the order herein to show cause why he shall not pay the receiver in bankruptcy herein the sum of $3,000 shown in his report as having been paid Messrs. M. A., D. A. & J. G. Sachs, and $200 to Zack Phelps, Esq., says that said sums were paid them, respectively, for services rendered him as his counsel whilst acting as assignee before any proceedings herein, as already appears in his report herein. He says further that he has no money or property or means of any kind with which to pay said money or any part thereof, and refers to his former response herein as part hereof.

"He respectfully submits to the court that he ought not to be compelled to pay said money herein.

"This respondent says, further, that long before the petition in this proceeding was filed and before he had any knowledge, information or intimation that it was intended to be filed, and relying upon it that he would be permitted to wind up his trust under the deed of assignment for the bankrupts shown in the record in this action of proceeding, he filed his petition and brought his action in the State court as appears in this record, which is still pending, and he is still subject to the jurisdiction and orders of said State court requiring him to settle his accounts there and to be responsible there for all his acts and doings under said deed of assignment.

"He submits to this honorable court that this response be held

sufficient, and that the 'show-cause' order herein should be annulled or suspended until he is relieved from his present embarrassing position.

"L. COMINGOR."

The foregoing response was sworn to. It was also adjudged insufficient by the referee. The rule was made absolute, and Comingor was ordered to pay to receiver the $3,000 which he alleged he had paid the Sachs as attorneys. Thereupon Comingor prayed
83 for a review by the judge of both the orders adjudging his responses insufficient and ordering him to pay to the receiver the said sums of $3,398.90 and $3,000, respectively. In his report to the judge the referee stated his findings to be that Comingor was entitled to no compensation whatever, and that his retention of the sum of $3,398.90 was unwarranted; and, further, that he had no legal right to pay attorney fees, when no allowance had been made by the State court therefor, and in contemplation of law the assignee must be deemed to have the funds in his possession. The referee concluded his report by saying, "These proceedings are now certified to the judge to deal with said Comingor for disobeying said rules to pay the two sums aforesaid." Pending the action of the court on this report, the judge referred the case back to the referee to take testimony and report what services and the value thereof Comingor had rendered to the estate before the petition in bankruptcy was filed, what services and their value he had rendered since the filing of the petition; what services, their necessity and value, the attorneys had rendered to the assignee, together with any modification he might choose to make of his former report and recommendation.

Upon this reference the receiver (who at some date not shown by the record had been converted into a trustee) and Comingor appeared. Proofs were offered by the parties and a stipulation entered into that a certain deposition which had been theretofore taken should be read and that the printed records of the former appeals to this court should be considered on the reference.

On December 11, 1900, the referee reported the evidence which he had taken and his conclusions thereon, that neither Comingor nor his attorneys had rendered services of value to the estate, but that their dealings with it had been injurious to the creditors, and that nothing should be allowed therefor. He stated, however, that the sum paid to the attorneys was "usual and reasonable according to the scale of compensation allowed for such services by the State court in Louisville." In conclusion the referee stated that he made no modification of his former report.

While this reference was pending, and on November 10, 1900, Comingor tendered an amended response which he offered to file, the substance thereof being as follows:

"Leonard Comingor amends his response herein to the orders to pay $3,398.90 and $3,000.00, and for amendment says that as shown by the pleadings, record and evidence in this case taken and
84 the entire proceedings had herein, neither this court nor the referee in bankruptcy herein has any jurisdiction, either

of this respondent or the matter involved, to make any such orders or require respondent to answer thereto, because he says the records herein show that all transactions with reference to said two (2) sums of money took place before the petition in bankruptcy was filed herein, and that neither this court nor the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay or by summary process."

And he prayed "that said rule be discharged and said orders to pay be set aside." This response the referee declined to entertain, and it was again tendered on the filing of the referee's report. The judge in confirming the report of the referee, held in respect to the amended response that though in fairness the claim of lack of jurisdiction might be referred to November 10, 1900, the date when it was tendered to the referee, it should not be entertained by the court for the reason that by long acquiescence in that mode of *procedure*, the respondent should be regarded as having consented thereto. Thereupon, the judge directed the entry of the following order:

"In the Matter of SINSHEIMER, LEVENSON & Co., etc.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, and Leo Stern. } In Bankruptcy.

"This cause coming on to be heard on the petition of Leonard Comingor, for review of the order of court entered herein by John B. Baskin, one of the referees of this court, requiring Leonard Comingor to pay over to the Louisville Trust Company, trustee in bankruptcy, herein, the sums of $3,398.90 and $3,000.00, and the court being fully advised, delivered a written opinion which was filed herein, and on January 19, 1901, and in pursuance of said written opinion, it is considered, ordered and decreed by the court that said petition for review filed by said Comingor, June, 1900, is refused and dismissed, to which said Comingor excepts, and it is adjudged and ordered by the court that said Comingor pay to said Louisville Trust Company, trustee, the said sums of $3,398.90 and $3,000.00 on or before February 16, 1901, to all of which said Comingor excepts."

Comingor then filed this petition for review.

85 SEVERENS, circuit judge, having made the foregoing statement, delivered the opinion of the court:

We have made a somewhat detailed statement of the course of proceedings in the case, in order to show the relation of the petitioner thereto, for it was upon the ground of the petitioner's implied consent to the mode adopted that the district judge justified it. We have only to review the orders of the referee in holding the responses made by this petitioner to the referee's orders to show cause why he should not be required to pay over the sums of $3,398.90 and $3,000, respectively, to the trustee, and his recommendation that the respondent be dealt with for his contempt in not complying therewith, and the judge's order confirming the same.

The two principal questions presented are, first, whether the petitioner was precluded from objecting to the form of procedure, and, second, if he was, whether it was properly pursued. It is contended in behalf of the trustee that Comingor was made a party to the petition for adjudication and that having thus been brought in he continued to be subject to the orders of the court without other process. But it appears that no special relief was prayed against him and it is manifest that the only legitimate object in making him a party was to enable him to contest the adjudication, the result of which might be to prejudice his rights as assignee. The bankruptcy act contains no specific provision authorizing such joinder of a third person in the petition for adjudication.

But the circuit court of appeals for the second circuit held, *In re* Meyer, 98 Fed., 976; 39 C. C. A., 368, that the assignee was entitled to intervene for the protection of his interest, but if that be so, it would not follow that he might be made a party by the petitioner. The object of the petition is not to finally litigate and determine adverse claims, certainly not to predetermine those questions which in due course remain to be determined in the usual course of administration, in case the bankruptcy is adjudged. If the assignee for the benefit of creditors is a proper party to the preliminary proceeding it can only be for the purpose of contesting one of the facts which would give his adversary ground for hostile proceeding, namely, the bankruptcy of the party proceeded against and the consequent investment of the bankrupt's title in the trustee. The only issue presented by the petition is whether the respondent is in such plight or has committed such an act as subjects him to the
86 operation of the bankrupt law, and all inquiry into other questions is *pro hac vice* only. Smith *v.* Belford, a case recently decided by this court. 106 Fed. It would be an anomalous result if the creditor by naming the assignee as a party to the petition for an adjudication and praying a subpœna for him could thereby bring him into the case for the purposes of all future inquiries and determinations to be made in the progress of the case. Such practice would be a clever device for defeating the right of the assignee to have his title ascertained and determined by the proper court and in a customary mode of proceeding. We are of opinion that the act cannot be construed as making the petitioning creditor able to thus subvert the rights of an adversary, and that Comingor was not, by reason of his having been made a party to the original petition in bankruptcy, precluded from his right to object to having the question of his obligation to pay the moneys specified in the order to show cause determined in that summary way. The character of the proceedings as shown by the record lacked the usual characteristics of a judicial proceeding. There was no petition by the trustee or other party stating any facts or presenting any issue, and it is not shown to have been made on the motion of any one. The inference reasonably to be drawn is that the referee perceiving these items in Comingor's statement of account, and thinking they were probably objectionable, *ex mero motu* made the orders to show cause why Comingor should not be required to pay them,

notwithstanding his claim to have appropriated the money in payment of his own fees or in payment for the services of his attorneys. It is fair to say as we did in Smith *v.* Belford, that these proceedings took place when the bankruptcy courts were many of them acting upon an interpretation of the law in respect to the use of summary proceedings, which has since been determined by the Supreme Court in the case of Bardes *v.* Hawardin Bank, 178 U. S., 524, to be wholly inadmissible.

But the district judge puts his conclusion upon the ground that the petitioner had acquiesced in the course pursued by making response to the orders asking to be relieved in the premises and going into proof before the referee and making stipulations concerning the proofs on the reference.

If his objection which he subsequently made and now insists upon does not so far concern the jurisdiction of the court as to render it not susceptible of waiver we should think there was some ground for that conclusion.

But it may well be doubted whether such a proceeding
87 is due process of law in such circumstances. Comingor had been ousted of his trust, and the question was that of his obligation to pay certain moneys alleged to be in his hands belonging to the trustee. By the remedy pursued he was deprived of his right to a trial by jury. The determination by the referee upon the facts would not be subject to appeal or writ of error. The judgment would not be enforced by execution, but by process for contempt. The proceeding when employed for such a purpose is in the nature of a civil remedy for the recovery of money. Quite generally, if not universally, State statutes founded on public policy forbid imprisonment as a remedy to compel the satisfaction of debts or other obligations not founded on wilful wrong, and this policy may not be countervailed by the consent of parties to a proceeding which results in defeating it. And such statutes are given effect in the courts of the United States by Rev. Stat., sections 990, 991.

Mallory Mfg. Co. *v.* Fox, 20 Fed., 409, per Wallace, C. J.; Low *v.* Durfee, 5 Fed., 256, per Lowell, C. J.; *Ex parte* Hooson, Law Rep., 8 Ch. App., 251.

The question of remedies is involved in that of jurisdiction. The remedy must have some reasonable fitness to the relief sought. Thus in an action of assumpsit the defendant could not be condemned for a trespass, nor in an action of ejectment could a judgment for money be recovered, nor could a proceeding for a mandamus be employed for the mere recovery of a debt. In an action at law one cannot obtain merely equitable relief; nor could a bill in equity be maintained on a purely legal cause of action. Nor would the appearance of the defendant and his contestation of the suit without objection to the jurisdiction authorize such judgment as in these instances is mentioned. And if, in any such case, the judgment or decree be not wholly void, it is at least subject to correction by appeal or writ of error in that suit. In the case of Marshall *v.* Knox, 16 Wal., 551, a case cited in that of Bardes *v.* Hawardin Bank, the assignee of the bankrupt claimed as assets certain prop-

erty in the hands of a sheriff taken on a writ of provisional seizure for rent due the lessor of the bankrupt. The assignee obtained from the bankruptcy court a rule upon the sheriff and the lessor to show cause why they should not deliver up the property to the assignee, alleging that it was necessary to enable the court to administer the claims of creditors. The lessor, without objecting, so far as appears, to the jurisdiction of the court, contested this rule, stating his own rights and proceedings, and claimed possession of the property through the sheriff
88 for the purpose of selling the same to raise the amount due for rent. But the rule was made absolute without further proof. He prayed an appeal which was not allowed. Thereupon he filed a bill in equity in the circuit court under the second section of the bankruptcy act of 1867, to enjoin the assignee from taking possession of the property under the order of the bankruptcy court, and for a decree that they should not molest him in his proceedings to collect the rent. He was denied the relief he sought by the circuit court and he, thereupon, appealed to the Supreme Court. Mr. Justice Bradley, in delivering the opinion of the court, after reciting the facts, stated the question to be whether the bankruptcy court had any authority to make the rule to show cause above mentioned, and as bearing upon that inquiry whether such a rule could be characterized as due process of law. After discussing the provisions of the act in reference to remedies and the prejudice to defendants of summary proceedings, he said, "We think it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defense of their rights."

And he stated the conclusion of the court in the following language: "The court is of opinion, therefore, that the district court proceeded without jurisdiction in compelling the lessor and the sheriff under a rule to show cause to deliver up possession of the goods in question to the assignees. It results that the bill in this case was properly filed as an original bill," etc. The decree of the circuit court was reversed with directions to grant the equivalent of the relief prayed. We have stated this case thus fully because it shows that the question involved is one of jurisdiction and that the party complaining of its exercise is not precluded from his objection by having contested a rule to show cause made by the bankruptcy court. It should be observed in this connection that the consent mentioned in section 23*b*, means consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure, which is regulated by general principles of law unless other provision is made. Under the second section of the act of 1867, the circuit court was given a somewhat similar power of superintendence, though by different methods, over the proceedings in the bankruptcy court, to be exercised "upon bill, petition, or other proper process," to that conferred upon the circuit courts of appeal by section 24*b* of the act of 1898. We are, therefore, inclined to
89 think that this petitioner was not precluded from his right to raise the objection to the mode of proceeding at the time

he did, which was before the making of the final order, and that the court erred in refusing to entertain it. His contestation of the order and his prayer for relief were substantially the same as those of the respondent in the rule to show cause in the case of Marshall *v.* Knox above cited. And we think he was no more subject to the control or jurisdiction of the court for the purposes of the proceeding than was the respondent to the rule in that case.

But, however this may be, we think upon any view of the lawfulness of the method of procedure adopted, the referee, and the court in confirming his order, erred in holding that the responses to the orders to show cause were insufficient. The action of the referee assumes that the facts were as stated by the respondent. These were that as to the item of $3,398.90 the respondent had retained those moneys as his commission as assignee in reliance upon the belief that he was entitled to that amount on final settlement, that he had used the money, relying upon its being his, until he had none of it left, that he is a man of no means, having neither money nor property of any kind, that he is unable after endeavoring to borrow or raise money to pay the same into court. With respect to the $3,000 paid to the Sachs, his attorneys, it was paid while they were acting as counsel for him, before the bankruptcy proceedings were commenced, for their professional services rendered to him as assignee. And with respect to the ability of the respondent to pay the money the same facts exist as with respect to his ability to pay the other sum. The referee was of the opinion that the respondent was not entitled to any compensation whatever, and that he had no legal right to pay fees to his counsel without an allowance therefor by the State court, and that, therefore, he "must be deemed to have the funds in his possession." The court ordered a reference for a further report in regard to the question whether the respondent was entitled to any compensation for his services as assignee, and whether the counsel were entitled to any. But no question was referred touching the fact that the respondent had retained and spent the money he claimed to be due him for his compensation, or the fact that he had paid the sum mentioned to his counsel, or the ability of the respondent to refund the moneys. The confirmation by the court affirmed the insufficiency of these facts to excuse the respondent from paying over the money, and the court, thereupon, ordered
him to pay it before a day named. With these adjudications
90 behind him there was nothing to follow but imprisonment,
from which there could be no prospect of relief but by reiteration of the same facts which would be unavailing. But it is well settled that a showing made by a respondent that he is unable to do an act required of him upon an order to show cause is a sufficient answer. It matters not for the purpose of such a proceeding that the inability to do the thing required may be in consequence of his own fault arising from a mere misconception of his rights or committed before the court took jurisdiction of the matter; the court cannot compel an impossibility. Hendryx *v.* Fitzpatrick, 19 Fed., 810, 814, per Lowell and Nelson, judges; *In re* Chiles, 22 Wal., 157,

168; Loveland on Bankruptcy, sec. 239; Kane *v.* Haywood, 66 N. Car., 1.

Other remedies may exist for punishing the petitioner, if there is ground for it, or for establishing a civil liability if the necessary facts exist.

The result is that the orders of the referee adjudging the responses of the petitioner insufficient and the order of the court confirming the same must be set aside.

91 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case entitled *In the matter of the petition of Leonard Comingor to review an order of the district court of the United States for the district of Kentucky*, No. 943, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 24 day of May, A. D. 1901.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

92 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit entitled In the matter of the petition of Leonard Comingor to review an order of the district court of the United States for the district of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
93 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of May, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit.

Pursuant to the command of the within writ of certiorari, I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do herewith transmit, under the seal of the said court, a true, full, and complete copy of the proceedings in said court in the cause and matter in the said writ of certiorari stated, together with all things concerning the same, to the Supreme Court of the United States, together with said writ of certiorari.

Seal United States Circuit Court of Appeals, Sixth Circuit.

Witness my official signature and the seal of said court, at Cincinnati, Ohio, in said circuit, this 3rd day of June, 1901, and the 125th year of the Independence of the United States of America.

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

94 [Endorsed:] File No., 18,138. Supreme Court of the United States. No. 653, October term, 1900. The Louisville Trust Co., trustee, &c., *vs.* Leonard Comingor. Writ of certiorari. Filed May 21, 1901. Frank O. Loveland, clerk.

Endorsed on cover: File No., 18,138. Supreme Court U. S., October term, 1901. Term No., 309. The Louisville Trust Company, petitioner, *vs.* Leonard Comingor. Writ of certiorari and return. Filed June 6, 1901.